
COMMENT

THE PARENT TRAP: REBALANCING PARALLEL ENFORCEMENT BETWEEN CHILD PROTECTIVE SERVICES AND LAW ENFORCEMENT

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At the intersection of family and criminal law, the logic of parallel enforcement enables the state, in the form of child protective services and law enforcement, to investigate and seek sanctions for the same underlying conduct in family court and the criminal justice system, respectively. But while that abstract rationale justifies the dual-enforcement regime, there is a different reality on the ground, where the systems frequently borrow from each other, collectively strengthening them. In the context of poverty-related neglect cases, this level of state intervention is often misplaced. At the same time, the government may find its hands tied in far more serious cases of child abuse, in which the nonoffending caregiver may exercise a veto over the prosecution by refusing to cooperate. This Comment rejects certain stereotypes about these caregivers—often mothers—and instead identifies the understandable lack of clarity with respect to the family and criminal systems as a barrier to justice. The Comment uses New York law and procedure as a case study for exploring and disentangling the two systems. First, it proposes reducing the use of criminal sanctions in the neglect context. Second, it suggests the use of formal agreements that clarify the roles of the child protective and criminal systems as a way to gain the cooperation of nonoffending caregivers in the criminal prosecution of child abuse. Finally, it demonstrates how these proposals comply with existing law and may be scaled up across the United States. By rebalancing the enforcement dynamic, the state can more effectively protect child welfare and support family unity.

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INTRODUCTION

For decades, something has been amiss in the way in which Child Protective Services (CPS) and law enforcement in New York pursue cases of child abuse and neglect. A working parent makes a bad judgment call, such as leaving a child home alone for a few minutes while going to buy groceries, and in the next moment, is under arrest for Endangering the Welfare of a Child.¹ Regardless of the outcome of the criminal case, CPS will launch an investigation of the parent, which could eventually result in the removal of the child from the home—all because of a temporary lapse in judgement.

¹ These facts are adapted from an example described in *People v. Cenat*, 671 N.Y.S.2d 578, 579 (N.Y.C. Crim. Ct., Kings Cnty. 1997).

Meanwhile, in a different but more serious case of child abuse, the outcome could be much different. For example, if a mother's boyfriend physically abused the child, CPS would lack jurisdiction over the case. If the district attorney brings a criminal case against him, the child's testimony would be critical. But the mother may refuse to cooperate with law enforcement because she is a survivor of domestic violence and fears retaliation, or because she is worried about additional interaction with CPS. Because of the mother's uncooperativeness, the criminal case against the physical abuser will fail either pursuant to the speedy trial statute,² or because the prosecutor lacks sufficient evidence to obtain a plea or go to trial.

This pair of hypothetical examples encapsulates the two major avenues through which New York pursues perpetrators of child abuse and neglect. The first is a civil system consisting of CPS and family court; the second is the criminal system comprised of police, prosecutors, and the criminal court. The systems are formally separate, allowing for the state to pursue sanctions in either or both, depending on the case.

But in reality, the civil and criminal systems frequently work together to share resources and even legal findings. This cooperation allows the state to pursue penalties in low-level child neglect cases, which are normally a byproduct of the parent's poverty. That cooperation is more limited in serious cases involving, for example, physical abuse, in which the police and district attorney's office must rely on the cooperation of the child's caregiver, or resort to coercive methods which will potentially separate the caregiver from the child, to make out their case. Because of this dynamic, the criminal case is at risk of falling apart early on. Correcting this confusing paradox—in which the government aggressively pursues neglect cases but lacks that same capacity in serious cases—requires reconsidering the appropriate roles of each system and communicating those distinctions to the communities those systems monitor and police.

In this Comment, I use New York as a case study to explore the interaction between CPS and law enforcement. I suggest that the framework of parallel enforcement represents a new way of thinking about the interaction of the two, describe how the application of that framework raises concerns about New York's pursuit of child abuse and neglect cases, and offer two concrete solutions toward solving the enforcement dilemma.³ In Part I, I describe the different ways in which New York CPS and law enforcement approach the problems of child

² See N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2020).

³ While I touch upon several important issues such as the use of foster care, the effectiveness of different CPS and law enforcement interventions, and the role of race in the child welfare system, a full exploration and evaluation of these topics, which have received extensive scholarly attention, is beyond the scope of this work. See, e.g., INST. OF MED. & NAT'L RSCH. COUNCIL, *NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH* 354 (Anne C. Petersen, Joshua Joseph & Monica Feit eds., 2014) (stressing the need for additional research in the areas of race and socioeconomic status).

abuse and neglect, as well as how the two systems are both required to and freely choose to interact with one another. I explicitly frame this issue as one of parallel enforcement—or the state's investigation and enforcement of the same underlying conduct in two different legal domains—and use this framework to illustrate the points of convergence and divergence between the systems. I then map the development of a typical CPS case, highlighting how this area of family law is a hybrid of state and federal law, and contrast CPS investigations and family court practice with law enforcement's approach. Despite the two systems' efforts to work together, different philosophical, institutional, and operational practices often lead to system clash, potentially jeopardizing each process.

In Part II, I examine an imbalance in the way that the state pursues cases of child abuse and neglect, identifying situations of both overenforcement and underenforcement of the law. Overenforcement is visible in how the state aggressively pursues low-level cases of child neglect, which are often triggered by the caregiver's poverty. Employing the rationale of parallel enforcement, the state activates both the child welfare system and law enforcement to obtain compounding sanctions for caregivers. Together, these processes may result in both child removal pursuant to a civil order and a criminal conviction for Endangering the Welfare of a Child. I show that the reliance on the logic of parallel enforcement is selective, providing the government with an abstract justification for pursuing two cases in different forums while simultaneously breaking down the theoretical separation between the two in day-to-day practice. The result is that both systems become more coercive. Drawing on sociological scholarship, I critique this crossover for weakening trust between the state and communities and ultimately harming children's well-being. I contend that clarity can be provided by shifting most of these cases to family court, which is better prepared to order the preventative services favored by recent developments in federal law.

I then turn to underenforcement, where I argue that while the state appears anxious to pursue low-level neglect cases, it does not handle cases of serious child abuse with the appropriate level of care. These cases, which often involve the caregiver's partner, are deeply challenging, as they are largely outside of the reach of CPS and difficult to successfully prosecute in criminal court. Here, I introduce the problem of the uncooperative caregiver, who may refuse to cooperate in law enforcement's investigation of the crime against the child. I suggest that contrary to certain stereotypes about mothers in particular, a lack of cooperation may be attributable to a sloppy system of parallel enforcement that fails, in theory and in practice, to communicate clearly with parents about the risks, or lack thereof, of supporting the district attorney's child abuse investigation. In order to disentangle parallel

enforcement in this area, I offer a modest proposal to provide the caregiver with certainty about the roles of the two systems.

In Part III, I conclude by demonstrating that these dual proposals—shifting neglect cases to family court and more aggressively pursuing serious abuse cases—would conform to both the letter and the spirit of state and federal law. While I primarily focus on New York, I refer to other jurisdictions to highlight common problems and areas for improvement. Because of the similarity of enforcement structures and systemic problems, I contend that the solution proposed here could be replicated in other U.S. jurisdictions.

I. BACKGROUND

CPS and law enforcement frequently work together either pursuant to a statute or because of a common interest in sharing responsibilities in child abuse and neglect cases. This includes investigating and sanctioning the same conduct in the civil and criminal systems, in a process known as parallel enforcement. The frame of parallel enforcement reveals points of convergence and divergence in a dual-enforcement regime. Indeed, operating under a parallel enforcement framework rarely results in seamless cooperation between the two agencies. As a result of different philosophical approaches and operational objectives, these agencies may come into conflict and interfere with each other's investigations. Nevertheless, recent attempts to deconflict the agencies' work—such as through the use of Child Advocacy Centers—has concretized a close relationship between them.

A. *The Criminal Justice–Child Welfare Nexus*

The criminal justice and child welfare systems have distinct roles in preventing and responding to child abuse and neglect.⁴ In New York, the purpose of the CPS⁵ system is to protect children by investigating reports of abuse and neglect and to “provid[e] protection for the child . . . from further abuse or maltreatment and rehabilitative services for the child or children and parents involved.”⁶ CPS has jurisdiction only over matters involving parents and other persons legally responsible (PLRs) for the child.⁷ While both

⁴ See DAVID I. SHEPPARD & PATRICIA ZANGRILLO, IMPROVING JOINT INVESTIGATIONS OF CHILD ABUSE 3 (1996) (stating that the two systems investigate allegations of child abuse, but that the use of that information “differs according to their respective missions”).

⁵ In New York City, the CPS agency is the Administration for Children's Services (ACS). See *Child Protective Proceedings (Abused or Neglected Children)*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/COURTS/nyc/family/faqs_abusedchildren.shtml [<https://perma.cc/VXL9-UXZH>].

⁶ N.Y. SOC. SERV. LAW § 411 (McKinney 2020).

⁷ See N.Y. FAM. CT. ACT § 1012(e)–(f) (McKinney 2020) (defining “abused child” and “neglected child” as involving parents or PLRs); see also N.Y. STATE OFF. OF CHILD. & FAM.

federal and state law govern the administration of child welfare services, child welfare is fundamentally a state issue,⁸ and New York belongs to a minority of states that administer these services at the county level.⁹ Fundamentally, CPS cases are civil proceedings within the domain of the local family court.¹⁰

In contrast, law enforcement—whose primary actors are the police and district attorneys—only becomes involved when the suspected child abuse or neglect is believed to rise to the level of criminal activity, and especially in cases of abuse occurring outside of the family.¹¹ Crimes against children are some of the most difficult to investigate and prosecute in part because children are considered “perfect victims” with a limited ability to protect and advocate for themselves.¹² As such, police officers and prosecutors responsible for child abuse and neglect cases often belong to specialized divisions or bureaus that focus on sensitive types of cases.¹³

SERVS., SUMMARY GUIDE FOR MANDATED REPORTERS IN NEW YORK STATE 3 (2019) (stating that if a report of child abuse or neglect does not allege a parent or PLR is the perpetrator, then “[t]his is not a CPS report, and local CPS will not be involved”).

⁸ See CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., *Federal and State Laws and Regulations*, <https://www.childwelfare.gov/topics/management/administration/requirements/laws> [<https://perma.cc/JSH5-YAU6>] (“Federal laws and regulations provide overarching standards and guidelines for . . . child welfare . . . but each State has its own laws and regulations for child welfare matters.”).

⁹ CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., STATE VS. COUNTY ADMINISTRATION OF CHILD WELFARE SERVICES 1-2 (2018) (noting the contrast to systems administered at the state level).

¹⁰ See N.Y. STATE OFF. OF CHILD. & FAM. SERVS., A GUIDE TO NEW YORK’S CHILD PROTECTIVE SERVICES SYSTEM (2001), <https://nyassembly.gov/comm/Children/20011016/html/doc.html#link4> [<https://perma.cc/V6XJ-RQ4D>] (“The purpose of the Family Court Act’s child abuse and neglect provisions is to help safeguard the physical, mental, and emotional well-being of abused and neglected children by establishing civil procedures to protect them.”); see also Douglas J. Besharov, *Family Court Handling of Child Protective Cases*, 53 N.Y. STATE BAR J. 113, 114-15 (1981) (discussing that while family court began with a fundamentally “rehabilitative” focus, child protective proceedings subsequently became more “formalized” as family court judges recognized the need for judicial decision-making). Family court has jurisdiction over a variety of other civil matters including juvenile delinquency, child support, and paternity. See generally FAM. CT. ACT §§ 111-1122 (compiling the laws governing the establishment and administration of family court, including its subject matter jurisdiction).

¹¹ See SHEPPARD & ZANGRILLO, *supra* note 4, at 3-4 (“Rarely does law enforcement investigate cases of child neglect or minor physical abuse reported to CPS unless they meet provisions in criminal statutes applying to criminal neglect or abuse.”).

¹² See CARL B. HAMMOND, KENNETH V. LANNING, WAYNE PROMISEL, JACK R. SHEPHERD & BILL WALSH, OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 2 (2d prt. 2001) (listing factors contributing to children’s vulnerability as potentially including physical and mental development, an emotional connection between a child and the abuser, and the long duration of child abuse and neglect crimes). Children’s weakness and dependency on adults make them susceptible to different types of violence; as a result, “children suffer far more victimization than do members of other age groups.” Eugene M. Lewit & Linda Schuurmann Baker, *Children as Victims of Violence*, 6 JUV. CT. 147, 147 (1996).

¹³ See, e.g., *Detectives*, N.Y.C. POLICE DEP’T, <https://www1.nyc.gov/site/nypd/bureaus/investigative/detectives.page> [<https://perma.cc/P885-892B>] (describing the Special Victims Division as responsible for sex crimes and child abuse); *Special Victims Bureau*, BROOKLYN DIST. ATTY’S OFF.,

Despite the systems' distinct purposes, New York law requires CPS and law enforcement to frequently¹⁴ work together to protect children.¹⁵ New York's guiding child welfare law, the Child Protective Services Act of 1973,¹⁶ requires child welfare administrators to consult with law enforcement in crafting their county-level Child and Family Services Plan, which sets out how the county agency will conform to the Social Services Law.¹⁷ In addition, various statutes provide for the mandatory and voluntary transmission of CPS reports to the district attorney in a given county.¹⁸ Each local CPS agency must also enter into a formal cooperation agreement with local law enforcement to define the procedures governing the referral of cases from CPS to the district attorney and communication between the agencies.¹⁹ In some civil cases, law enforcement will play only a limited operational support role for CPS caseworkers carrying out investigations.²⁰ For example, the presence of a police officer can protect a CPS caseworker's safety when the caseworker may encounter a dangerous situation during a home visit, especially if the caseworker plans to remove a child from the home.²¹

The relationship between the two agencies is more complicated, and perhaps even fraught, when law enforcement is pursuing a criminal case alongside CPS' civil action.²² In other words, two formally distinct legal

<http://www.brooklynnda.org/special-victims-division> [<https://perma.cc/HLR5-3GJH>] (describing the Special Victims Bureau as responsible for the same subject matter as the police's Special Victims Division and stating that there is cooperation between the two offices).

¹⁴ See generally Theodore P. Cross, David Finkelhor & Richard Ormrod, *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, 10 CHILD MALTREATMENT 224, 224 (2005) (noting the co-involvement in cases is common).

¹⁵ See N.Y. STATE OFF. OF CHILD. & FAM. SERVS., CHILD PROTECTIVE SERVICES MANUAL ch. 6 L-1 (2020) [hereinafter CPS MANUAL] (describing law enforcement's complementary role in supporting CPS).

¹⁶ N.Y. SOC. SERV. LAW §§ 411-428 (McKinney 2020).

¹⁷ *Id.* § 423(3)(a); see also CNTY. OF MONROE, *Required Interagency Consultations*, in MONROE COUNTY CHILD & FAMILY SERVICES PLAN 1 (2018), <https://www2.monroecounty.gov/files/hs/APPROVED%202018-2023%20Child%20and%20Family%20Services%20Plan.pdf> [<https://perma.cc/ZP44-MLWM>] (showing that state and local law enforcement were consulted in the creation of an upstate county's Child and Family Services Plan).

¹⁸ See SOC. SERV. § 424(5-a) (requiring CPS to transmit reports involving the death or physical or sexual abuse of a child); *id.* § 424(4) (allowing the district attorney to request and receive all CPS reports in a given county).

¹⁹ See CPS MANUAL, *supra* note 15, at ch. 6 L-4 (stating the requirement); *id.* at ch. 14 K-1-K-6 (providing a model memorandum of understanding). For an example of actual agreement between the two agencies, see MEMORANDUM OF UNDERSTANDING CPS/DA (2011), [<https://perma.cc/BR86-W6DM>], which defines the roles of CPS and the district attorney in Rockland County and requires CPS to transmit its cases when it "appears that a crime may have been committed."

²⁰ See DONNA PENCE & CHARLES WILSON, THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT 6-7 (1992).

²¹ See *id.*

²² See Cross et al., *supra* note 14, at 224 ("The two disciplines have expressed a contradictory mix of apprehension and enthusiasm about working together.").

regimes “must investigate the same incident, involving the same people,”²³ in a process also known as parallel enforcement.²⁴ While scholars have not yet comprehensively examined family law and criminal law through the lens of parallel enforcement,²⁵ a framework that centers the different actors, processes, and remedies available in each system can allow policymakers to see and appreciate the points at which the agencies’ competencies and authority overlap, as well as where they diverge.

In over forty New York cities and counties, the state has attempted to create a synergistic relationship between the two agencies through multidisciplinary teams (MDTs), often deployed within a local Child Advocacy Center (CAC).²⁶

23 PENCE & WILSON, *supra* note 20, at 7; *see also id.* (using the phrase “parallel investigation” in this setting); Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow,’* N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html> [<https://perma.cc/U6FX-JTAH>] (“In New York, authorities pursue child neglect cases on two tracks. The district attorney can file a criminal charge of child endangerment; separately, [ACS] can file a family court case . . .”).

24 Cf. Anthony O’Rourke, *Parallel Enforcement and Agency Interdependence*, 77 MD. L. REV. 985, 985-86 (2018) (defining parallel enforcement as “[p]rosecutors and civil regulators . . . combin[ing] their resources to pursue concurrent actions against the same defendant in a variety of domains”).

25 That being said, scholars have applied this framework in specific settings in the broader child welfare context. *See, e.g.,* William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473 (1990) (examining the Fifth Amendment implications of concurrent or consolidated proceedings); Emily A. Cook, Comment, *Separate, Parallel Paths—These Lines Should Never Cross: Why Texas Needs a Bright-Line Rule to Determine When a Child Protective Services Agent Acts as a Law Enforcement Agent*, 366 TEX. TECH L. REV. 365, 371 (2008) (criticizing a lack of clarity with respect to Fifth Amendment protections to statements made to Texas CPS agents). *But see* O’Rourke, *supra* note 24, at 985-86 (identifying current scholarship on parallel enforcement in the areas of financial regulation, immigration, environmental law, and taxation, but not explicitly child welfare). Perhaps one reason why family law is not commonly considered in this context is because parallel enforcement is strongly associated with federal laws and regulations, and child welfare is essentially a state matter. *See* U.S. Dep’t of Just., Justice Manual § 1-12.000 (2018) (discussing how United States Attorneys must coordinate criminal investigations and parallel regulatory matters against corporate defendants); Stacey Mitchell & Amanda Kane, *Parallel Proceedings or Piling On?*, AM. BAR ASS’N (July 2, 2018), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2017-2018/july-august-2018/parallel-proceedings [<https://perma.cc/38H2-LHDK>] (discussing parallel enforcement of environmental crimes and issues by federal agencies).

26 *See* N.Y. SOC. SERV. LAW § 423-A(1) (McKinney 2020) (mandating that the Office of Children and Family Services establish CACs “to the greatest extent practicable”); *see also id.* § 423(6) (allowing a district-level agency to create such a program). New York’s CACs are located around the state, and recent efforts have sought to expand their accessibility to child victims. *See New York CACs*, NE. REG’L CHILD.’S ADVOCACY CTR. (2020), <https://www.nrcac.org/find-a-cac/new-york-state-cacs> [<https://perma.cc/EWQ2-W5XD>] (detailing locations of CACs in New York State); *Governor Cuomo Announces Over \$4 Million to Support Child Advocacy Centers and Mobile Units*, N.Y. STATE (Dec. 28, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-over-4-million-support-child-advocacy-centers-and-mobile-units> [<https://perma.cc/VX5R-QDVQ>] (announcing the establishment of mobile CACs to reach more rural areas of the state). The large number of CACs in New York is consistent with the national trend toward the establishment of such facilities. *See Multidisciplinary Team*, NAT’L CHILD.’S ADVOC. CTR. (2019), <https://www.nationalcac.org/multidisciplinary-team> [<https://perma.cc/VRZ8-3375>] (noting that more than 1,000 CACs have opened in the United States since 1985).

The MDT/CAC model aims to centralize the government's response to cases of child abuse and neglect in a "safe, child-focused environment."²⁷ Not all child abuse and neglect cases are investigated at the CAC; rather, the CAC is designed for cases in which "[criminal] prosecution may be a component,"²⁸ and particularly for those cases involving "sexual abuse or serious physical abuse."²⁹ The MDT—composed of law enforcement, CPS, a forensic interviewer, a mental health provider, a medical professional, and a family advocate—coordinates the response in order to preserve the integrity of investigations and avoid retraumatizing the child victim.³⁰ A key feature of the CAC is its one-time interview of the child by a trained professional, which avoids requiring the child to repeat the narrative of abuse.³¹ While not every professional in the MDT is required to be involved in every case, members with investigative roles (i.e., police, district attorney, and CPS) "must participate in joint interviews and conduct investigative functions consistent with the mission of the specific agency member involved."³² As such, the two agencies now work together as a matter of daily practice, even if they are not always unified in the pursuit of the same end goal.

B. CPS Investigation and Family Court

With the key stakeholders and institutions now introduced, it is possible to chart the development of a typical child abuse or neglect case. Here, it is important to note that any case involves a number of junctures at which either CPS or law enforcement can open, continue, or end an investigation or court action. First, a report is made to the statewide central register either by a community member or mandatory reporter³³ (i.e., a person who is obliged to

²⁷ See *How the CAC Model Works*, NAT'L CHILD'S ALL. (2019) <https://www.nationalchildrensalliance.org/cac-model> [<https://perma.cc/KTY8-HQME>] (describing a typical CAC).

²⁸ CPS MANUAL, *supra* note 15, at ch. 6 L-7.

²⁹ See SOC. SERV. § 423-A(1). One possible explanation for this limitation on the use of the MDT/CAC model is the resource-intensive nature of this approach. In less serious cases in which the investigators do not employ the MDT/CAC model, the cases will be pursued in parallel, with the police and CPS separately working with the victim and possible witnesses. See generally HAMMOND ET AL., *supra* note 12, at 6-7 fig.1 (providing considerations for a police officer to take into account when investigating child abuse, including advice on how to interview the child victim and obtain evidence from the crime scene).

³⁰ See *How the CAC Model Works*, *supra* note 27.

³¹ *Id.*; see Memorandum from the N.Y. State Off. of Child. & Fam. Servs. Div. of Child Welfare & Cmty Servs. on Multidisciplinary Teams and Child Abuse Investigations to Loc. Dist. Comm'rs, 10-OCFS-LCM-09, at 2 (Aug. 9, 2010) (endorsing the empirical support for the effectiveness of MDTs, especially the reduced need for multiple interviews, provision of victim services, and clear communication with the family).

³² CPS MANUAL, *supra* note 15, at ch. 6 L-7.

³³ See SOC. SERV. § 413(1)(a) (listing a large number of mandatory reporters including physicians, registered nurses, and school administrators and teachers); *id.* § 414 (allowing any other

report suspected neglect or abuse because of work with children).³⁴ CPS is obligated to begin a preliminary investigation within twenty-four hours, which includes a face-to-face or telephone interview with the child and review of prior CPS involvement in the household.³⁵ If the allegation involves serious physical or sexual abuse, CPS must immediately notify law enforcement so that a joint investigation through the use of an established MDT or ad hoc team will be launched.³⁶ At the CAC, the MDT will conduct the forensic interview and may collect evidence (including through taking photos and interviewing other witnesses), and conduct a medical exam and provide treatment.³⁷

Regardless of whether the child was brought to the CAC, CPS must comply with a host of regulatory requirements before “making a determination” on the report.³⁸ In addition to interviewing the child, these requirements include, but are not limited to, interviewing the reporter and other reporting sources, conducting a safety assessment at the child’s home within one week of receiving the report, obtaining information about other children in the home, and communicating with the person under investigation about the status of the case.³⁹ Within sixty days, CPS must make a final determination with regard to whether there is “enough evidence to support the claim that the child has been abused or neglected.”⁴⁰ It will then “indicate” or “unfound” a report.⁴¹ If the report is unfounded, the investigation ends, although CPS may still provide the family with social services.⁴²

If CPS indicates the report, it has several options at its disposal, including offering rehabilitative services and, if needed, making arrangements to move the child and other children in the home into an out-of-home placement.⁴³

person to file a report). A mandatory reporter who fails to report “suspected child abuse or maltreatment” may be subject to criminal sanctions and civil liability. *Id.* § 420.

³⁴ See *id.* § 415 (describing the reporting procedure); CPS MANUAL, *supra* note 15, at ch. 2 A-1–A-2 (describing the role of and identifying mandatory reporters). Reports can come about in other ways, too. In the most serious cases, a report comes about not because of a direct report to CPS but rather because of a 9-1-1 call concerning a crime against a child, see *How the CAC Model Works*, *supra* note 27, while in a “masked incident,” the police discover evidence of abuse or neglect while responding to a different crime altogether, see Cross et al., *supra* note 14, at 226.

³⁵ SOC. SERV. § 424(6)(a); CPS MANUAL, *supra* note 15, at ch. 6 B-1.

³⁶ SOC. SERV. § 424(5-a)–(5-b). CPS may also be obligated to notify law enforcement pursuant to a local agreement, see CPS MANUAL, *supra* note 15, at ch. 6 L-1, or may do so discretionarily, see SOC. SERV. § 424(5-a).

³⁷ *How the CAC Model Works*, *supra* note 27.

³⁸ N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(iv) (2020).

³⁹ *Id.* § 432.2(b)(3)(ii).

⁴⁰ *A Parent’s Guide to a Child Abuse Investigation*, N.Y.C. ADMIN. FOR CHILD’S SERVS., <https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page> [https://perma.cc/NX4D-8BHR].

⁴¹ N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(iv).

⁴² See *A Parent’s Guide to a Child Abuse Investigation*, *supra* note 40.

⁴³ N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(4)(i)–(iii).

Critically, all of this can take place without any official action in family court.⁴⁴ In all cases, CPS is required to “assess whether the best interests of the child require Family Court or Criminal Court action and initiate such action, whenever necessary.”⁴⁵ At this stage, CPS may petition the family court for an Article 10 factfinding hearing to determine whether the respondent (“parent, guardian or other person legally responsible for the child”⁴⁶) abused or neglected the child.⁴⁷ If the family court sustains CPS’ petition, the family court will proceed to a dispositional hearing in which it may enter orders, including removal of the child from the home.⁴⁸

Once the family court reaches the dispositional stage, state and federal law require the court to prioritize the best interests of the child while moving toward the goal of family reunification.⁴⁹ In particular, the Adoption and Safe

⁴⁴ See *id.* § 432.2(b)(4)(ii) (“[CPS] may, where appropriate, provide for or arrange for and coordinate services to children named in child abuse and/or maltreatment reports . . . prior to a determination as to whether some credible evidence exists as to the alleged abuse or maltreatment.”); Emily Jennings, Note, *Separating Families Without Due Process*, 22 CUNY L. REV. 1, 11-12 (2019) (“Whether or not court intervention is needed depends on the ACS worker’s judgment of the seriousness and the credibility of the allegations, and the parent’s willingness to agree to services (e.g., drug treatment, mental health services) to improve the alleged concerns.”). New York CPS is authorized to enter into safety plans, or a “clearly identified set of actions, including controlling interventions when necessary, that have been, or will be taken without delay, to protect child(ren) from immediate or impending danger or serious harm,” to secure compliance. CPS MANUAL, *supra* note 15, at ch. 6 D-2. These plans have been criticized for the lack of judicial oversight involved. See, e.g., Andrew Brown, *Shadow Removals: How Safety Plans Allow CPS to Avoid Judicial Oversight*, THE HILL (May 31, 2019, 9:30 AM), <https://thehill.com/opinion/judiciary/446108-shadow-removals-how-safety-plans-allow-cps-to-avoid-judicial-oversight> [<https://perma.cc/E9zT-2HQM>] (arguing that safety plans are used when a “caseworker has concerns about a family, but lacks sufficient evidence to convince a court to support a removal” and that the choice to enter into such an agreement is illusory). CPS caseworkers can use the threat of subsequent family court action to obtain compliance with the safety plan. See, e.g., *In re Kathleen NN.*, 62 N.Y.S.3d 587, 589 (App. Div. 2017) (showing that a CPS caseworker informed a child’s mother that the mother’s boyfriend needed to stay away from the child in accordance with the safety plan and “that there would be court proceedings if he remained”).

⁴⁵ N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(vi).

⁴⁶ CPS MANUAL, *supra* note 15, at ch. 9 C-1.

⁴⁷ See N.Y. FAM. CT. ACT § 1031 (McKinney 2020) (specifying how CPS may begin a proceeding to determine abuse or neglect). CPS is also authorized to pursue temporary orders such as an order of protection or an order to compel the respondent to accept services. See *generally id.* §§ 1021–30 (governing temporary removal and preliminary orders); CPS MANUAL, *supra* note 15, at ch. 9 C-1.

⁴⁸ FAM. CT. ACT § 1027(a)(iii); see *id.* § 1045 (defining a dispositional hearing); CPS MANUAL, *supra* note 15, at ch. 9 F-1 (describing the various circumstances in which a child may be removed from the home). Formally, removal (whether pursuant to an emergency determination or after a hearing) should only occur when there is an “imminent risk to the child’s life or health.” See FAM. CT. ACT § 1027(b)(i); cf. *Bennett v. Jeffreys*, 356 N.E.2d 277, 280 (N.Y. 1976) (“The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances.”).

⁴⁹ FAM. CT. ACT § 623; see also N.Y. SOC. SERV. LAW § 384-B(1)(a)(ii) (McKinney 2020) (“[I]t is generally desirable for the child to remain with or be returned to the birth parent because the child’s need for a normal family life will usually best be met in the home of its birth parent . . .”). While CPS must consider the best interests of the child in determining whether to initiate action in family

Families Act (ASFA), a watershed piece of federal legislation, mandates that “reasonable efforts shall be made to preserve and reunify families.”⁵⁰ Placement outside the home triggers biannual permanency hearings at which the family court judge will approve of a permanency goal—including return to the child’s parents, adoption following a termination of parental rights, referral for legal guardianship, or placement with a relative—and evaluate progress toward the goal.⁵¹ In this back and forth with CPS and the family court, families find the system difficult to navigate and unresponsive to their unique, complicated needs.⁵² For its part, ASFA has done little to reduce the

court, *see* N.Y. COMP. CODES R. & REGS. tit. 18 § 432.2(b)(3)(vi), the family unity standard is not formally operative prior to an adjudication of abuse and neglect by the family court. *See* FAM. CT. ACT § 622 (demonstrating the absence of these standards at the factfinding hearing); *id.* § 1047(a) (stating that the dispositional hearing follows the factfinding hearing).

⁵⁰ Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115; *see* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 843 (1977) (noting the importance of the “blood relation” between parent and child in Supreme Court case law). Professor Richard Gelles has vociferously argued against aggressive reunification efforts with biological families, contending that such efforts rarely succeed and that that prolonged attempts to achieve reunification can harm child welfare. *See* Richard J. Gelles, *Protecting Children Is More Important Than Preserving Families*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 329, 331-34 (Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh eds., 2005).

⁵¹ FAM. CT. ACT § 1027(h) (setting the requirement for the initial permanency hearing); *id.* § 1089 (regulating the content and timing of permanency hearings). Section 1089 belongs to Article 10-A of the Family Court Act, which was passed in December 2005 to enhance compliance with ASFA, demonstrating federal influence over state child welfare law. *See* Alicia Summers & Christine Sabino Kiesel, *Enhancing the Quality of Hearings in New York State: Using Data to Drive Improvement*, AM. BAR ASS’N (Jan. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/january-2016/enhancing-the-quality-of-hearings-in-new-york-state--using-data- [https://perma.cc/FF3T-ZK8W]. In 1999, New York became the last state to come into conformity with ASFA, which requires that “reasonable efforts shall be made to preserve and reunify families.” *See* 42 U.S.C. § 671(a)(15)(B); FAM. CT. ACT § 1039-b (allowing the state to petition to lift the reasonable efforts requirement); *In re* Marino S., 795 N.E.2d 21, 25 n.3 (N.Y. 2003) (“New York was the last of the 50 states to conform its law to the federal statute.”). While New York law is designed to embody a “constant concern for prompt permanency in a child’s life,” *id.* at 25, the 2005 law’s demand for fast permanency hearings has “added pressure to an overburdened court system.” *See* Summers & Kiesel, *supra*.

⁵² *See* Victoria Weisz, Sarah J. Beal & Twila Wingrove, *The Legal System Experiences of Child, Families, and Professionals Who Work with Them*, in STRESS, TRAUMA, & WELLBEING IN THE LEGAL SYSTEM 63, 63, 74 (Monica K. Miller & Brian H. Borenstein eds., 2012) (“Resolution to the problems and struggles families are experiencing is sought, but resolution is often ambiguous, without a clear sense of what a fair outcome would be.”); ABIGAIL KRAMER, CTR. FOR N.Y.C. AFFS., IS REFORM FINALLY COMING TO NEW YORK CITY FAMILY COURT? 3, <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/569e7d8bbfe8737de9301b71/1453227404613/CWW+%7C+Is+Reform+Finally+Coming+to+Family+Court%3F.pdf> [https://perma.cc/C82M-EF9Q] (“[T]he city’s Family Courts are chronically overburdened and under-resourced, plagued by high caseloads, overworked staff, and a stubborn legacy of dysfunction and delay. Getting from the start to the end of a case is almost never straightforward.”); Sandra Bass, Margie K. Shields & Richard E. Behrman, *Children, Families, and Foster Care: Analysis and Recommendations*, FUTURE CHILD., Winter 2004, at 4, 23 (“Courts play a central role in child welfare decision making, but most children and families regard them as foreboding and distant.”).

complex nature of family court cases, which “require[] judicial oversight across multiple hearings” in a setting where rules are largely shaped by judicial actors and the family court system itself.⁵³

C. System Clash

While CPS’ institutional focus is on child and family affairs, law enforcement approaches the investigation of child abuse and neglect under the same basic framework it uses for the prosecution of any other crime.⁵⁴ Whether investigating under the MDT/CAC model or on its own, law enforcement’s primary concern is “build[ing] criminal cases against alleged offenders” through collecting evidence and preparing the case for prosecution and eventual punishment.⁵⁵ Here, parallel enforcement can create ripe opportunities for conflict. First and centrally, “criminal law and family law serve different, incompatible purposes.”⁵⁶ Unlike criminal law, which is concerned with retribution, deterrence, incapacitation, and rehabilitation,⁵⁷ family law seeks the practical resolution of issues in family life.⁵⁸ Whereas criminal law “send[s] normative messages” to the wider society based on

⁵³ Summers & Kiesel, *supra* note 51; cf. SOPHIE I. GATOWSKI, NANCY B. MILLER, STEPHEN M. RUBIN, PATRICIA ESCHER & CANDICE MAZE, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 7-8 (2016) (explaining that while ASFA codified several positive reforms, it also transformed family court judges into “the gatekeepers of our nation’s foster care system,” creating new and often unmanageable levels of stress on the system that makes achieving permanency difficult).

⁵⁴ See PENCE & WILSON, *supra* note 20, at 5 (“Law enforcement officers tend to view child abuse and neglect not as a social problem, but rather in the context of criminal law . . .”). Of course, there are some aspects involving the prosecution of these crimes that are unique beyond the use of specialized personnel, such as the need to establish the fact that a crime against the child actually took place. *See id.* This is distinct from, for example, a burglary, where there is a presumption that a crime has actually occurred. *See id.* (“[I]f Mrs. Jones reports her house has been burglarized, the responding officers can enter the case with the presumption that a crime has occurred . . .”). Similarly, and reflective of the weight placed on successfully prosecuting crimes against children, New York has developed a special toll on the statute of limitations for certain major sex crimes against children. *See* N.Y. CRIM. PROC. LAW § 30.10(3)(f) (McKinney 2020).

⁵⁵ SHEPPARD & ZANGRILLO, *supra* note 4, at 4.

⁵⁶ Samuel V. Schoonmaker, *Criminal Law or Family Law: The Overlapping Issues*, 44 FAM. L.Q. 155, 155 (2010); accord Viola W. Lindsey, Child Abuse Investigations: How CPS and Law Enforcement Engage in Collaboration 3 (June 2011) (Ph.D. dissertation, Loma Linda University), <https://scholarsrepository.llu.edu/cgi/viewcontent.cgi?article=1040&context=etd> [<https://perma.cc/KN6V-3QCV>] (“Dissimilarity in professional philosophies and belief systems around the matter of punishment versus treatment continues to be a major source of conflict between CPS social workers and law enforcement officers.”).

⁵⁷ See generally SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 96 (10th ed. 2017) (identifying these goals).

⁵⁸ See Schoonmaker, *supra* note 56, at 156 (“[Family law’s] primary purpose is to stabilize and preserve families by solving practical problems . . .”).

judgments about past behavior, family law seeks to stabilize and improve the future situations of the individuals and families that come within its reach.⁵⁹

This difference in mission is reflected in the agencies' workplace cultures and practices.⁶⁰ To begin, the two organizations operate in an environment in which there is a perceived hierarchy between them, as "[l]aw enforcement's authority is . . . much more widely accepted than the CPS authority."⁶¹ This public view, which is rooted in beliefs about the police's forcefulness, can be seen within the organizations as well.⁶² Generally, police are trained to make decisions rapidly in the field without immediate oversight, while social workers operate within a team model that emphasizes extensive consultation.⁶³ Relatedly, whereas the police are primarily focused on past conduct, CPS has an interest in developing and maintaining a "cooperative and productive relationship" with the family in order to fulfill its legal mandate to consider the interests of the family unit.⁶⁴ These divides represent a major barrier to cooperation, as law enforcement views CPS as slow to react and CPS, in turn, perceives law enforcement as rash.⁶⁵ With regard to CPS, some police officers think, "I want to deal with the bad guys; you go talk to the kids," while CPS caseworkers emphasize that "[a]ll crimes are social problems."⁶⁶ These specific issues exacerbate more generic problems related to "interorganizational coordination," especially concerning institutional loyalty to one's own agency.⁶⁷

⁵⁹ See *id.* at 156-57.

⁶⁰ See NAT'L INST. OF JUST. & NAT'L CTR. ON CHILD ABUSE & NEGLECT, JOINT INVESTIGATIONS OF CHILD ABUSE 7-8 (1993) [hereinafter NIJ/NNCCAN REPORT] ("Failure to understand these differences can lead to mutual suspicion, reinforced by professional loyalty and even insularity."); see also Lindsey, *supra* note 56, at 1-3 ("[T]he two entities have traditionally approached an investigation from very different perspectives, creating conflict and biases in their working relationships.").

⁶¹ See PENCE & WILSON, *supra* note 20, at 7 ("Many times CPS caseworkers are denied access to alleged victims of maltreatment while law enforcement's requests to see the child are honored.").

⁶² See *id.* (noting that CPS workers who are accorded the same authority as law enforcement officers to forcibly remove children from their homes often do not exercise this authority without police assistance); accord Lindsey, *supra* note 56, at 72 (concluding, from questionnaire responses gathered from 192 police officers, that law enforcement officers describe themselves as more forceful and aggressive than social workers).

⁶³ PENCE & WILSON, *supra* note 20, at 9; see Lindsey, *supra* note 56, at 8-10 (describing "[d]ifferences in socialization" between the agencies). Of course, social workers in the field may also need to make high-stakes decisions in emergencies. See N.Y. FAM. CT. ACT § 1024(a) (McKinney 2020) (granting social workers the authority to remove a child without parental consent or a court order in an emergency situation).

⁶⁴ See CPS MANUAL, *supra* note 15, at ch. 6 F-3; accord PENCE & WILSON, *supra* note 20, at 9.

⁶⁵ See PENCE & WILSON, *supra* note 20, at 9.

⁶⁶ NIJ/NNCCAN REPORT, *supra* note 60, at 7-8.

⁶⁷ Laura F. Skaff, *Child Maltreatment Coordinating Committees for Effective Service Delivery*, 67 CHILD WELFARE 217, 219 (1988); see also *id.* at 222 (identifying differing objectives, financing, turf disputes, and community denial as problems in establishing committees designed to coordinate the community's

A lack of dialogue between the two systems creates risks for the agencies' operations. Particularly in cases in which there is no joint investigation (i.e., with an MDT/CAC model), there are heightened chances for redundancy and inconsistency, as CPS caseworkers and police "may conduct separate, parallel investigations, visiting homes independently and conducting separate interviews" with little interaction between the agencies.⁶⁸ At the investigation stage, CPS might accidentally tamper with or destroy physical evidence⁶⁹ or produce unhelpful or conflicting pieces of evidence that may eventually become discoverable impeachment material in a criminal case.⁷⁰ In the interim, law enforcement may view any visitation between the child and the biological parents as compromising the criminal investigation,⁷¹ while CPS may view such contact as legally mandated⁷² as well as therapeutic.⁷³ Later on, CPS might desire a disposition focused on services in an intrafamilial matter, a goal that would obviously be undermined by law enforcement seeking a criminal conviction and perhaps incarceration.⁷⁴ Further complicating this dynamic is the "dizzying nature" of simultaneous

response to child abuse and neglect); NIJ/NNCCAN REPORT, *supra* note 60, at 10 ("Turf battles, politics, and administrative rigidity influence the behavior of too many people in leadership positions.").

⁶⁸ Cross et al., *supra* note 14, at 3-4.

⁶⁹ See PENCE & WILSON, *supra* note 20, at 10.

⁷⁰ See CIV. ACTION PRAC. OF THE BRONX DEFS., THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE 6 (2015) (explaining that collateral proceedings, such as in family court, "can be a useful source of discovery for the criminal defense attorney" and can have hidden consequences in criminal cases); cf. *How the CAC Model Works*, *supra* note 27 (warning against "a well-meaning teacher or other adult" asking the "wrong questions" of the child victim and thereby jeopardizing the case). Other actors' improper interviewing of the child victim can complicate an eventual prosecution in other ways, too. See, e.g., *People v. Michael M.*, 618 N.Y.S.2d 171, 177-78 (Sup. Ct., Kings Cnty. 1994) (granting a defendant's motion for a suppression hearing on the basis of allegedly suggestive questioning by a physician concerning sexual abuse).

⁷¹ See PENCE & WILSON, *supra* note 20, at 9-10 (observing that law enforcement officers sometimes suspect abusive parents use visitations primarily to pressure their children into recanting their criminal allegations).

⁷² See N.Y. FAM. CT. ACT § 1030 (McKinney 2020) (granting respondents in Article 10 proceedings "the right to reasonable and regularly scheduled visitation with a child" removed from the home absent a court determination that such visitation would pose a risk to the child).

⁷³ See PENCE & WILSON, *supra* note 20, at 9-10; cf. N.Y. State Off. of Child. & Fam. Servs. Admin. Directive 17-OCFS-ADM-14, Family Visiting Policy for Children in Foster Care, at 2 (Oct. 5, 2017) ("Frequent and consistent parent-child contact that takes place in as natural an environment as possible preserves the emotional attachment of parents and children to each other, reduces the trauma of separation for both the child and the parent, allows parents to practice day-to-day parenting skills, and can expedite reunification.").

⁷⁴ See PENCE & WILSON, *supra* note 20, at 10 ("In intrafamilial cases, recommendation for treatment outside of the correctional system has been a fairly common procedure for CPS staff. The vast majority of law enforcement officers are extremely skeptical about the efficacy of most treatment programs and, indeed, about the expertise of most therapists.").

proceedings in the family and criminal court systems, which might issue “duplicative, conflicting or incompatible orders.”⁷⁵

Thus, while MDTs and CACs may improve some aspects of the case, particularly at the investigative stage,⁷⁶ they cannot entirely deconflict parallel investigations.⁷⁷ Experts have critiqued this lack of coordination for some time and have stressed that “[t]he investigatory processes and goals of both agencies need to be complementary rather than in conflict with each other.”⁷⁸ Certainty, there are cases in which the agencies must cooperate more closely to perform effectively. But it is also important to recognize that the systems are not locked in an irreconcilable conflict. On the contrary, both systems selectively borrow from the logic of parallel enforcement to enable the two formally separate regimes to work hand-in-hand across a variety of areas, exceeding the type of organizational cooperation contemplated by existing law. The ensuing lack of clarity as to which agency is responsible for what tasks blurs the theoretical lines between the systems, breaking down restraints on their respective roles and thereby maximizing the state’s coercive capacity over those under investigation.

II. REBALANCING PARALLEL ENFORCEMENT

Despite philosophical differences between CPS and law enforcement, the conflict between the two may be more superficial than the evidence reviewed here immediately suggests. Parallel enforcement allows the state to pursue separate civil and criminal investigations for the same conduct, resulting in the overenforcement of child welfare and criminal laws in poverty-related neglect

⁷⁵ Schoonmaker, *supra* note 56, at 157; *see, e.g.*, *Samantha WW. v. Gerald XX.*, 969 N.Y.S.2d 180, 183 (App. Div. 2013) (describing a situation in which a family court order requiring a mother to facilitate contact with the child’s father would directly violate a criminal court order of protection against the father with regard to the mother).

⁷⁶ *See* James Leslie Herbert & Leah Bromfield, *Evidence for the Efficacy of the Child Advocacy Center Model: A Systematic Review*, 17 TRAUMA, VIOLENCE, & ABUSE 341, 353 (2015) (stating that while there is some evidence that CACs provide law enforcement with advantages “earlier in the criminal justice process” and in building “a stronger case,” the scope of such benefits is undercut because of the relative scarcity of criminal trials).

⁷⁷ *See* Marina Lalayants & Irwin Epstein, *Evaluating Multidisciplinary Child Abuse and Neglect Teams: A Research Agenda*, 84 CHILD WELFARE 434, 453-54 (2005) (summarizing the literature on MDT effectiveness and concluding that MDTs generally provide benefits including improved communication, access to expertise, and reduced redundancies, but also noting potential difficulties related to differing philosophies and diffused responsibility among the professionals involved). There is significant variance in terms of effectiveness studies’ measurement criteria. *See* Herbert & Bromfield, *supra* note 76, at 348 (reviewing the contemporary literature and concluding that studies of CAC effectiveness tend to focus on law enforcement goals and only rarely on the more family-centric outcomes relevant to CPS).

⁷⁸ INGER J. SAGATUN & LEONARD P. EDWARDS, *CHILD ABUSE AND THE LEGAL SYSTEM* 115 (1995).

cases. Although parallel enforcement suggests that the systems are distinct, it simultaneously justifies cooperation between them, which strengthens both. As such, moving more of these cases into the civil system exclusively would relieve the burdens associated with parallel enforcement. At the same time, law enforcement underenforces cases of serious child abuse, sometimes because nonoffending caregivers refuse to cooperate with the authorities. Contrary to popular views about caretakers, noncooperation may derive from the blurred lines between the two systems and uncertainty about the potential costs of cooperation. One step toward overcoming this uncertainty is providing caregivers with clarity about the roles of the civil and criminal systems.

A. Overenforcement of Neglect

In the past decades, CPS and law enforcement have been increasingly willing to pursue low-level allegations of child neglect and seek serious remedies in family and criminal court.⁷⁹ The dual pursuit of these cases represents a full embrace of parallel enforcement. Because the statutes governing neglect and agencies' procedures do not clearly delineate each agency's role, each may pursue its own goals without regard to what the other is doing; that is to say, the investigations can be truly parallel. In practice, the doubling is excessive relative to the harm in neglect cases.⁸⁰ Insofar as each agency pursues increasingly punitive goals, the end effect is compounded civil and criminal penalties in neglect cases, undermining both systems' concern with protecting child welfare.

1. CPS as "Police-Lite"

In pursuing child abuse and neglect cases, CPS activity has frequently come to resemble an underregulated form of policing. In recent years, scholars have paid increased attention to and warned against the national trend toward the criminalization of various aspects of family law and family life.⁸¹ This trend has harmed the relationship between CPS and the communities that the agency is meant to support.

⁷⁹ See *infra* subsections II.A.1.a–b, II.A.2.a.

⁸⁰ See *supra* notes 24–25 and accompanying text (discussing the purpose and practice of parallel enforcement).

⁸¹ See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 74 (2002) (describing the child welfare system's focus on "child protection" over "child welfare" as the system's "fundamental flaw" and noting that as a result, parents in inner-city neighborhoods "view caseworkers more as law enforcement agents than social service providers"); Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1278–95 (2019) (analyzing the shift from criminal enforcement of child support nonpayment to adjudication in nominally civil family courts that nevertheless maintained criminal court-like powers); Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285, 336–51 (2017)

a. *CPS' Broad Mandate*

Several factors have pushed family law in New York toward criminalization. First, CPS has a broad mandate to protect “abused and maltreated children.”⁸² In particular, New York defines a “neglected child” as a child younger than eighteen years old “whose physical, mental or emotional condition has been impaired or is in imminent danger of being impaired as a result of the failure of his parent or [PLR] to exercise a minimum degree of care” with respect to the provision of “food, clothing, shelter or education . . . though financially able to do so or offered financial or other reasonable means to do so.”⁸³ The failure to meet the requisite standard of care also applies to “proper supervision or guardianship,” the infliction (or allowing the infliction) of harm, including “excessive corporal punishment,” drug or alcohol abuse, “or by any acts of a similarly serious nature requiring the aid of the court.”⁸⁴ As such, the statute is quite broad.

For some time, New York family courts struggled to parse this statutory language, but the Court of Appeals finally provided clarity in 2004.⁸⁵ In *Nicholson v. Scoppetta*, plaintiffs brought a section 1983 federal class action against ACS⁸⁶ for its practice of removing children who had witnessed domestic violence from their mothers.⁸⁷ In responding to certified questions from the Second Circuit, New York’s highest court—the Court of Appeals—tightened the neglect standard.⁸⁸ The court first explained that a neglect claim requires both a showing of “actual (or imminent danger of) physical, emotional or mental impairment to the child,” which includes the demonstration of a causal connection between the parent’s behavior and the child’s injury.⁸⁹ Second, the standard for “minimum degree of care” is that of

(explaining that community supervision associated with the criminal law system interferes with many aspects of family life, including cohabitation choices, living spaces, relationships and caretaking, stability, and loyalty); Melissa Murray, *The Space Between: The Cooperative Regulation of Criminal Law and Family Law*, 44 FAM. L.Q. 227, 230–31 (2010) (contending that criminal law supports family law in enforcing a normative vision of family life rooted in marriage).

⁸² See N.Y. SOC. SERV. LAW §§ 411–12 (McKinney 2020) (establishing the mandate).

⁸³ See N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2020).

⁸⁴ See *id.* § 1012(f)(i)(B). The abandonment of a child by a parent or guardian may also constitute neglect. See *id.* § 1012(f)(ii). The statutory definitions of abuse and neglect share some features. See *id.* § 1012(e)(i) (defining an “abused child” as a child younger than eighteen years old whose parent or PLR “inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ”).

⁸⁵ See *Nicholson v. Scoppetta*, 820 N.E.2d 840 (N.Y. 2004).

⁸⁶ ACS is the name for CPS in New York City. See *supra* note 5.

⁸⁷ See *Nicholson v. Scoppetta*, 344 F.3d 154, 161 (2d Cir. 2003).

⁸⁸ *Nicholson*, 820 N.E.2d at 844.

⁸⁹ *Id.* at 845 (construing FAM. CT. ACT § 1012(f)(i)).

a “reasonable and prudent person in similar circumstances.”⁹⁰ Critically, the court stated, this inquiry should not turn on the caretaker’s particular economic or social circumstances; in other words, the family court “will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior.”⁹¹ While the *Nicholson* decision had “wide-ranging positive effects” in reducing child removals in domestic violence cases,⁹² it has not appeared to have had the same effect in the other contexts that give rise to child neglect cases.

Indeed, under the existing broad neglect standards there are many available paths for reporting suspected maltreatment, and partially as a result of mandatory reporting laws,⁹³ CPS receives a tremendous number of reports. In federal fiscal year (FFY) 2018, New York CPS received 165,311 reports, of which 79,710 were substantiated, a rate of less than 50%.⁹⁴ As a result, 218,684 New York children received some sort of CPS intervention that year, an 8.9% increase in comparison to FFY 2014.⁹⁵

As a prophylactic measure, CPS overenforcement makes intuitive sense from the perspective of a caseworker on the front line. After all, every caseworker fears “letting a child die,” and repeated, high-publicity errors by a strained child welfare system mobilize enormous popular and political pressure on the system to be proactive in so-called “foster care panics.”⁹⁶ Later

⁹⁰ *Id.* at 845-46.

⁹¹ *Id.* at 845.

⁹² See Kathleen A. Copps, Comment, *The Good, the Bad, and the Future of Nicholson v. Scoppetta: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 510-17 (2009) (analyzing the implications of the decision in subsequent CPS litigation in the domestic violence context).

⁹³ See Douglas J. Besharov, “*Doing Something*” About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL’Y 539, 545 (1985) (concluding that mandatory reporting laws were “strikingly effective” in increasing the number of reports from the 1960s to the 1980s).

⁹⁴ CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2018 12 tbl.2-1, 27 tbl.3-2 (2018) [hereinafter CHILD MALTREATMENT 2018]. All references from the report are to federal fiscal year (FFY) 2018. See *id.* at 1.

⁹⁵ *Id.* at 25 tbl.3-1. The state reported 203,127 children named in reports in 2018. N.Y. STATE OFF. OF CHILD. & FAM. SERVS., 2018 BRIGHT SPOTS DATA PACKAGE 4 tbl.1 (2018). The small difference between the slightly higher federal figure and this one could be due to the timing of publication. There are many more children than reports because a report may name more than one child, or CPS may come to learn of more children in an investigated household later on in the process. See CPS MANUAL, *supra* note 15, at ch. 6 B-2 (stating that the CPS safety assessment may include children not named in the initial report).

⁹⁶ See Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), <https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child-welfare-agency-reform> [<https://perma.cc/RZ5T-BZW5>] (“The force of the pendulum swing between child protection and family preservation is often driven by high-profile tragedies.”); Eli Hager, *Is Child Abuse Really Rising During the Pandemic?*, MARSHALL PROJECT (June 15, 2020, 5:00 AM), <https://www.themarshallproject.org/2020/06/15/is-child-abuse-really-rising-during-the-pandemic> [<https://perma.cc/P8FP-NB2C>] (quoting a family defense attorney who described the child

on, family court judges share those same incentives to favor CPS intervention because they do not want to risk “making a mistake and having a child die.”⁹⁷ In particular, systemic failures preceding the January 2006 killing of seven-year-old Nixzmary Brown by her abusive stepfather in Brooklyn “prompted an overhaul of [New York City’s] child welfare system.”⁹⁸ These reform measures included the removal or reassignment of senior ACS employees, the hiring of hundreds of new caseworkers as well as, significantly, police liaisons “to ease the sometimes tense relationships between caseworkers and officers at police precincts.”⁹⁹ But while such post-crisis reforms can uncover and lead to the correction of systemic problems within a child welfare agency,¹⁰⁰ they now represent an overcorrection.

b. *Pursuing Neglect and the Strain on Communities*

CPS overenforcement is most clearly observable in neglect cases, which comprised 60.8% of all child maltreatment cases nationally in FFY 2018.¹⁰¹ In New York, 55.4% of CPS cases involved only neglect, while 40.0% of cases involved multiple forms of maltreatment.¹⁰² Between November 2019 and

welfare system as “particularly, extremely sensitive to the media”); *see also* Besharov, *supra* note 93, at 540 (noting that child protective professionals insert themselves into private family lives more often than is necessary because of pressure from public concern and news stories of child abuse); COMM. ON CHILD MALTREATMENT RSCH., POL’Y, & PRAC. FOR THE NEXT DECADE: PHASE II, NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH 207 (Anna C. Petersen, Joshua Joseph & Monica Feit eds., 2014) (“Because government outsourcing often occurs as a reaction to a tragic event, political pressures can lead to ignoring strategic planning and creating overly aggressive implementation schedules and procedures.”); *id.* at 230-31 (explaining how actions like mass firings in response to negative media attention following high profile CPS errors makes internal quality control difficult).

⁹⁷ *See* Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 15 n.70 (2019) (citing SPECIAL WELFARE ADVISORY PANEL, ANNIE E. CASEY FOUND., ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 48 (2000)).

⁹⁸ *See* Kareem Fahim, *Mother Gets 43 Years in Death of Child*, 7, N.Y. TIMES (Nov. 12, 2008), <https://www.nytimes.com/2008/11/13/nyregion/13nixzmary.html> [<https://perma.cc/PST7-G2AM>]. Brown’s mother was subsequently convicted of manslaughter and other charges for her failure to protect her daughter from the abuse. *See id.*

⁹⁹ Cindy Rodriguez, *ACS Struggles to Remake Itself in Wake of Nixzmary Brown Case*, WNYC (Dec. 11, 2006), <https://www.wnyc.org/story/82028-ac-struggles-to-remake-itself-in-wake-of-nixzmary-brown-case> [<https://perma.cc/MHR3-C3ZU>].

¹⁰⁰ A citywide investigation after the Brown case found that in 2005, “ACS was having major difficulties conducting thorough and timely child welfare investigations,” resulting in errors in fifty-eight of the seventy-five ACS-involved child fatality cases that year. *See* OFF. OF THE N.Y.C. PUB. ADVOC., DANGEROUS MISTAKES: ANALYSIS OF ACS CORRECTIVE ACTIONS INVOLVING CHILD FATALITIES IN 2005, at 3 (2007) (stating that the errors included “delays in completing investigations in violation of state law, and failure to interview all applicable parties involved in the case”).

¹⁰¹ CHILD MALTREATMENT 2018, *supra* note 94, at 21.

¹⁰² *Id.* at 41 tbl.3-8. While the percentage of cases involving only neglect falls below the national average, New York’s reporting on the fraction of cases involving multiple forms of maltreatment (40%) was significantly higher than the national average. *See id.* at 21 (stating that nationally, 10.7%

January 2020, 60% of reports in New York City contained neglect allegations (with an additional 8% alleging educational neglect), while only 12% of cases alleged physical abuse.¹⁰³ As Professor Dorothy Roberts has argued, CPS' aggressive pursuit of these neglect cases is fundamentally tied to poverty.¹⁰⁴ The mere fact that a parent is poor cannot be the basis of a CPS investigation, but living in poverty often leads to one.¹⁰⁵ Poverty creates stress on families that contributes to the aggressive treatment of children.¹⁰⁶ It makes it more likely that neglect will be reported due to more extensive contact with authorities who administer benefits and welfare programs.¹⁰⁷ And poverty "may directly cause harms for which parents are held responsible," such as an inability to buy food.¹⁰⁸ In this context, enforcement, which takes places mostly "outside the public eye,"¹⁰⁹ has serious consequences for family life, especially in poor communities and the communities of color which frequently fall under CPS' microscope.¹¹⁰

The enforcement situation in New York is particularly acute. More investigations take place in neighborhoods with high levels of childhood

of cases involved physical abuse only and 7.0% sexual abuse only, while 15.5% involved multiple forms of maltreatment). This may be a result of a new federal classification scheme that counts multiple reports falling within a single maltreatment category only once. *See id.* at 21.

¹⁰³ N.Y.C. ADMIN. FOR CHILD'S SERVS., FLASH MONTHLY INDICATOR REPORT 29 (2020), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/02.pdf> [<https://perma.cc/QUS7-5P3H>].

¹⁰⁴ *See* ROBERTS, *supra* note 81, at 34 ("When child protection agencies find that children have been neglected, it usually has to do with being poor."). There is a strong link between poverty and child neglect reporting. One recent, fascinating study showed that a \$1 increase in the minimum wage resulted in a 9.6% decrease in neglect reports. Kerri M. Raissian & Lindsey Rose Bullinger, *Money Matters: Does the Minimum Wage Affect Child Maltreatment Rates?*, 72 CHILD. & YOUTH SERVS. REV. 60, 63-64 (2017).

¹⁰⁵ *See In re Divine W.*, 74 N.Y.S.3d 849, 851-52 (Fam. Ct., Kings Cnty. 2018) (rejecting poverty alone as a basis for a finding of neglect after a father provided a CPS caseworker with only limited information about the housing and supplies for his newborn child); *see also id.* at 853 (expressing skepticism at the idea that CPS would subject a family in a wealthier area of New York City to the same type of questioning about the ability to care for an infant). Similarly, poverty alone cannot be the basis of an adverse family court finding. *See* N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2020) (limiting liability for neglect to cases in which the parent is "financially able" or "offered financial or other reasonable means" to offer the necessities needed to meet the minimum level of care).

¹⁰⁶ *See* ROBERTS, *supra* note 81, at 31-32.

¹⁰⁷ *Id.* at 32-33.

¹⁰⁸ *Id.* at 33.

¹⁰⁹ Nikita Stewart, *How New York City's Child Welfare Chief Is Trying to Fix His Agency's Image*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/nyregion/how-new-yorks-child-welfare-chief-is-trying-to-fix-his-agencys-image.html> [<https://perma.cc/EGW5-9PSV>].

¹¹⁰ *See Surveillance Isn't Safety—How Overreporting and CPS Monitoring Stress Families and Weakens Communities*, RISE (Sept. 17, 2019) [hereinafter *Surveillance Isn't Safety*], <http://www.risemagazine.org/2019/09/surveillance-isnt-safety> [<https://perma.cc/42Z5-QPXT>] (explaining that CPS launches more investigations in communities of color).

poverty in which many Black and Hispanic residents live.¹¹¹ A recent report separately controlled for both child poverty and race, and concluded that each correlates with an increased likelihood of investigation.¹¹² In Hunts Point, an overwhelmingly Hispanic neighborhood in the South Bronx, CPS investigated 10% of all families in 2017, while in Brownsville, a heavily Black neighborhood in Brooklyn, CPS investigated almost one-third of families between 2010 and 2014.¹¹³ Mothers in these communities report experiencing feelings of fear,¹¹⁴ resulting in behaviors that may exacerbate the underlying conditions that first brought the family under investigation.¹¹⁵ For example, caregivers may avoid contact with mandatory reporters such as doctors and teachers out of an abundance of caution.¹¹⁶ In communities where few or low-quality social services are offered, children are cut off from needed supports that cannot be provided at home.¹¹⁷ Furthermore, the coronavirus crisis, as well as its associated lockdowns, health effects, and economic consequences, are falling hardest on the families least equipped to manage such disruptions.¹¹⁸

¹¹¹ ANGELA BUTEL, CTR. FOR N.Y.C. AFFS., DATA BRIEF: CHILD WELFARE INVESTIGATIONS AND NEW YORK CITY NEIGHBORHOODS 3 (2019).

¹¹² *Id.* at 2-4. Interestingly, the report notes that the correlation based on race does not extend to the indication rate. *Id.* at 1.

¹¹³ See *Surveillance Isn't Safety*, *supra* note 110; see also *Hunts Point/Longwood*, NYU FURMAN CTR., <https://furmancenter.org/neighborhoods/view/hunts-point-longwood> [<https://perma.cc/K5XZ-2EFQ>] (providing census data and other information about the neighborhood through 2018); *Brownsville*, NYU FURMAN CTR., <https://furmancenter.org/neighborhoods/view/brownsville> [<https://perma.cc/G4TW-WZCB>] (same).

¹¹⁴ See Joyce, *supra* note 96 (describing intergenerational distrust with regard to CPS enforcement in New York City).

¹¹⁵ See, e.g., *Surveillance Isn't Safety*, *supra* note 110 (reporting on one mother who experienced seven investigations and began preemptively taking pictures of her children each day before school to demonstrate their condition to CPS in the event of a subsequent investigation).

¹¹⁶ See ROBERTS, *supra* note 81, at 32-33; see also Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1794-95 (2018) (evaluating data from Providence, Rhode Island and concluding that low-income mothers engaged in selective avoidance of "intensive non-profit services like homeless shelters" and were cautious about releasing information to officials in institutional settings).

¹¹⁷ See ROBERTS, *supra* note 81, at 173-200 ("Racism has consistently led to a resolution of this tension [between punishing the "undeserving poor" and supporting children] that refuses adequate social support for families and hurts Black families the most."); see also Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1477-78, 1484 (2012) (explaining that "[a]t the same time that it is dismantling its social safety net, the government has intensified its coercive interventions in poor communities of color" and noting that the government turned toward disruptive "out-of-home care" as more minority children entered the child welfare system).

¹¹⁸ See Jason DeParle, *The Coronavirus Generation*, N.Y. TIMES (Aug. 22, 2020), <https://www.nytimes.com/2020/08/22/sunday-review/coronavirus-poverty-child-allowance.html> [<https://perma.cc/D454-F2BW>] ("With hunger rising, classrooms closing and parental stress surging, the pandemic is a threat to low-income children of epochal proportions, one that could leave an entire generation bearing its scars."); see also Wendy Ruderman, *Philadelphia's Most Vulnerable Children Suffer Fallout from COVID-19 Crisis*, PHILA. INQUIRER (Apr. 6, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-covid19-philadelphia-poverty-asthma-adhd-anxiety-20200406.html>

This leaves them at increased risk of facing an investigation.¹¹⁹ At bottom, today's CPS practice breeds a lack of trust between communities and the agency, which "is often perceived as intimidating, incompetent, or both."¹²⁰

c. *Weak Safeguards in CPS Investigations and Family Court*

CPS overenforcement is particularly troublesome when the case proceeds to family court, where there are significantly fewer protections for parents than there are for defendants in criminal court.¹²¹ This begins with the right to counsel. In *Lassiter v. Department of Social Services*, the U.S. Supreme Court declined to find an automatic right to appointed counsel in proceedings to terminate parental rights.¹²² But the Court noted that "[a] wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution."¹²³ Indeed, in New York's family courts, respondents in Article 10 abuse and neglect proceedings have a constitutional right to counsel.¹²⁴ However, the right does attach during the early, investigative stages of the child

[<https://perma.cc/8BRU-UFYH>] ("For children already on the fringes—living with poverty, health problems, and special needs—the pandemic has swept them further toward the edge.").

¹¹⁹ See CITIZENS' COMM. FOR CHILD. OF N.Y., CHILD ABUSE & NEGLECT PREVENTION DURING COVID-19: PROMOTING CHILD SAFETY AND SUPPORTING FAMILIES (2020), <https://s3.amazonaws.com/media.cccnewyork.org/2021/01/CCC-Brief-Child-Welfare-Prevention-During-Covid-19.pdf> [<https://perma.cc/38S3-8FX8>] (noting that increased inability to meet children's needs because of coronavirus-related "disruptions in employment and pay, growing health concerns and new barriers to accessing affordable food, maintaining safe and stable housing, and meeting other critical necessities" may "bring children and their families to the attention of the child welfare system"); see also, e.g., Bianca Vázquez Toness, *Your Child's a No-Show at Virtual School? You May Get a Call from the State's Foster Care Agency*, BOS. GLOBE, <https://www.bostonglobe.com/2020/08/15/metro/your-childs-no-show-virtual-school-you-may-get-call-states-foster-care-agency> [<https://perma.cc/B6TE-QPJN>] (Aug. 15, 2020, 4:07 PM) (reporting on cases in Massachusetts in which school officials made neglect reports to CPS solely because children failed to log onto their computers for remote instruction, most frequently in communities of color).

¹²⁰ See Stewart, *supra* note 109 (describing efforts by the New York City's Commissioner of Child Welfare to improve ACS' image, including by hiring new caseworkers and investigators, developing a closer relationship with ACS employees, and advocating against budget cuts).

¹²¹ See SAGATUN & EDWARDS, *supra* note 78, at 108 ("When compared to the due process afforded to parents in family and juvenile dependency cases, the accused in a criminal proceeding receives significantly more rights before being subject to criminal sanctions.").

¹²² 452 U.S. 18, 31-32 (1981). The Court acknowledged that the Due Process Clause might require the appointment of counsel under certain circumstances. *Id.*

¹²³ *Id.* at 33.

¹²⁴ N.Y. FAM. CT. ACT §§ 261, 262(a)(i) (McKinney 2020) (codifying *In re Ella R. B.*, 285 N.E.2d 288 (N.Y. 1972)). Others have followed suit: forty states and Washington D.C. have created an "absolute and unqualified statutory right to counsel" after CPS proceedings begin, four have a qualified right, and five leave the decision to the judge. VIVEK SANKARAN & JOHN POLLOCK, A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN STATE-INITIATED DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS CASES 1 (2016).

abuse or neglect case.¹²⁵ At this stage, uncounseled parental decision-making can be highly consequential because parents may voluntarily agree to services or even removal.¹²⁶ In turn, it is unsurprising that nearly half of child removals in New York City take place without any prior family court oversight.¹²⁷ This stands in contrast to, for example, the judicial involvement in obtaining a standard search or arrest warrant.¹²⁸ Similarly, the right to counsel in the criminal sphere attaches earlier—“upon the commencement of formal proceedings”¹²⁹—including plea bargaining before trial.¹³⁰

Although indigent parents in New York family court have the right to publicly-funded counsel, the delivery of that right has had “serious shortcomings” for thirty years and is currently in a state of “crisis.”¹³¹ Because counties coordinate delivery,¹³² “the caliber of representation received by parents is largely dependent on the wealth, priorities, and political will of the counties,” and funding is insufficient.¹³³ Accordingly, while parent representation is a

125 FAM. CT. ACT § 262(a) (providing for counsel in various circumstances following the initiation of family court proceedings); COMM’N ON PARENTAL LEGAL REPRESENTATION, INTERIM REPORT TO CHIEF JUDGE DIFIORE 16 (2019) [hereinafter INTERIM REPORT] (“[A] parent’s access to counsel is contingent on the filing of a petition by CPS and the parent’s appearance in court.”). A family court judge retains the discretionary authority to appoint counsel when mandated by the New York or federal Constitution. *See* FAM. CT. ACT § 262(b).

126 *See* INTERIM REPORT, *supra* note 125, at 19 (explaining how a family may make significant decisions about the case before having contact with a lawyer); *see also* FAM. CT. ACT § 1021 (allowing for removal with a caregiver’s consent).

127 *See* FAM. CT. ACT § 1024 (authorizing emergency removals); Michael Fitzgerald, *Hearings: Emergency Removals to Foster Care Have Surged in New York. Here’s One Case*, CHRON. SOC. CHANGE (Apr. 24, 2019, 5:48 AM), <https://chronicleofsocialchange.org/featured/hearings-emergency-removal-new-york-city/34685> [<https://perma.cc/H884-QHRV>] (showing that in 2018, 46.8% of child removals were emergency removals); *cf.* INTERIM REPORT, *supra* note 125, at 18 (stating that at a hearing in which counsel is unconstitutionally absent, the judge’s decision may “continue an extrajudicial CPS removal that has already occurred”).

128 *See generally* N.Y. CRIM. PROC. LAW § 690.35 (McKinney 2020) (describing the detailed components of a search warrant application).

129 *See* U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6; *People v. West*, 615 N.E.2d 968, 970 (N.Y. 1993).

130 *See* *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) (establishing a right to counsel during the entry of a guilty plea); *see also* *Missouri v. Frye*, 566 U.S. 134, 145 (2012) (“[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”).

131 *See* INTERIM REPORT, *supra* note 125, at 6, 13.

132 *See* FAM. CT. ACT § 262(c).

133 *See* INTERIM REPORT, *supra* note 125, at 24-29, 40-42. This inconsistent delivery reflects a national problem. *See* Vivek Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 8 (2017) (“Not only does variance exist among states as to when, or if, counsel must be appointed to represent parents; it also exists as to the adequacy of that lawyer.”).

major priority in New York City, anecdotal evidence suggests that upstate counties fall short of statutory requirements to provide counsel.¹³⁴

In family court, respondents have access to few of the procedural safeguards that a criminal defendant is entitled to. This is most clearly reflected in family court's "unique statutory and common law rules" concerning evidence that are "capable of shocking the uninformed practitioner."¹³⁵ A parallel enforcement rationale undergirds these relaxed rules, as explained by the Court of Appeals: "Because the accused parent is not subject to criminal sanctions in a child protective proceeding, the Legislature has provided that the usual rules of criminal evidence do not apply."¹³⁶ These special rules are permissive, allowing for the introduction of evidence that would be, for example, excluded as hearsay at a criminal trial.¹³⁷ The family court may admit "any writing, record, or photograph" created at a hospital or agency documenting the alleged neglect or abuse, even if the creator of the evidence is unknown.¹³⁸ Relatedly, "previous statements made by the child" are admissible, even if uncorroborated, although the judge cannot make a finding of abuse or neglect on the basis of uncorroborated evidence alone.¹³⁹ That being said, "any other evidence tending to support the reliability of previous statements" may corroborate the child's testimony.¹⁴⁰ Furthermore, in practice, family court judges may be even more permissive in admitting evidence than these rules permit. As Professor Vivek Sankaran has noted, this is because the nature of the disputes in family court—in which judges are encouraged to solve problems—can foster an informal environment in which

¹³⁴ See INTERIM REPORT, *supra* note 125, at 18-22 (detailing issues related to timeliness and notice in several upstate counties but reflecting favorably on innovative practices in New York City designed to provide parents with a lawyer earlier in the process); see also Lucas A. Gerber, Yuck C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 52 (2019) (examining an interdisciplinary approach to parent representation in New York City child welfare cases and finding that the model led to reduced stays in foster care and no reductions in child safety). Additional problems include inconsistent standards used in determining whether parents are truly indigent (and therefore entitled to a county-funded lawyer), heavy caseloads, and low compensation rates for court-appointed attorneys. See INTERIM REPORT, *supra* note 125, at 30-39, 43-44.

¹³⁵ See Gary Solomon, *Child Abuse and Neglect Proceedings*, in NEW YORK FAMILY COURT PRACTICE § 2:73 (Merril Sobie ed., 2020).

¹³⁶ *In re Nicole V.*, 518 N.E.2d 914, 915 (N.Y. 1987); see also Guillermo v. Agramonte, 29 N.Y.S.3d 720, 722 (App. Div. 2016) ("Family Court matters are civil in nature and the Confrontation Clause applies only to criminal matters . . .").

¹³⁷ See FAM. CT. ACT § 1046(a); accord Merrill Sobie, Practice Commentary, McKinney's Consol. Laws of N.Y., N.Y. FAM. CT. ACT § 1046(a).

¹³⁸ FAM. CT. ACT § 1046(a)(iv).

¹³⁹ *Id.* § 1046(a)(vi).

¹⁴⁰ *Id.*; see also *In re Nicole V.*, 518 N.E.2d at 916 ("Of course, Family Court Judges presented with the issue have considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated and whether the record as a whole supports a finding of abuse.").

limited, basic safeguards, such as reliance on appellate authority and rules of evidence, are treated with laxity relative to criminal court.¹⁴¹

This lack of procedural safeguards is striking. Family court proceedings can seem like criminal trials in that “they pit individuals against the state and issue moral condemnation of parents.”¹⁴² Such proceedings are fundamentally adversarial,¹⁴³ and their complexity can leave parents feeling confused and disempowered.¹⁴⁴ This is exacerbated by the open-ended nature of family court proceedings,¹⁴⁵ in which even a disposition is normally “near the beginning of the court’s involvement” with the family, who will have to return for numerous hearings to create, modify, or end different legal relationships vis-à-vis the child,¹⁴⁶ in contrast to the relative finality obtained through criminal sentencing.¹⁴⁷ The lack of due process protections in family court is especially alarming because the outcome of a child protection proceeding can be far more consequential to a parent than a criminal conviction.¹⁴⁸ In particular, family court’s ultimate remedy—the termination of parental rights—has been analogized to the “civil death penalty.”¹⁴⁹

¹⁴¹ See Vivek Sankaran, *Child Welfare Is A System in Need of Umpires*, CHRON. SOC. CHANGE (Aug. 12, 2019, 9:00 PM), <https://chronicleofsocialchange.org/child-welfare-2/the-child-welfare-system-needs-its-judges-to-be-umpires/36871> [<https://perma.cc/9MM9-T95U>] (“State and federal statutes provide strong protections for children and their families. But laws are meaningless unless they are enforced.”). Family court judges have perhaps the greatest leeway when it comes to enforcing court rules. See N.Y. UNIF. R. FAM. CT. 205.1(b) (enabling a family court judge to suspend any rule except those governing the structure of the court system if there is “good cause” and it is “in the interests of justice”); see also Toby Kleinman & Daniel Pollack, *Challenges Attorneys Face When Family Courts Do Not Follow Rules of Evidence*, LAW.COM (Oct. 21, 2019, 12:00 PM), <https://www.law.com/newyorklawjournal/2019/10/21/challenges-attorneys-face-when-family-courts-do-not-follow-rules-of-evidence> [<https://perma.cc/9MM9-T95U>] (critiquing such waiver rules as allowing the introduction of scientifically unsound evidence into dependency proceedings in family court).

¹⁴² ROBERTS, *supra* note 81, at 91.

¹⁴³ See generally Kathleen A. Bailie, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2306, 2306 n.154 (1998) (collecting sources and critiquing an approach in family court that places apportioning blame over family protection).

¹⁴⁴ See Vivek Sankaran, *My Name Is Not ‘Respondent Mother’: The Need for Procedural Justice in Child Welfare Cases*, AM. BAR ASS’N CHILD L. PRAC. TODAY (June 6, 2018), <https://repository.law.umich.edu/articles/1992> [<https://perma.cc/PA2L-SK2K>] (describing in detail the process of family court proceedings that can leave parents feeling “dejected, hopeless, and angry”).

¹⁴⁵ See KRAMER, *supra* note 52, at 3 (explaining that “[o]nce a case lands in court, allegations tend to cascade” as other caregiver behaviors come to light).

¹⁴⁶ Weisz et al., *supra* note 52, at 69.

¹⁴⁷ See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 611 (5th ed. 2015) (explaining that sentencing provides a “bottom line” in criminal adjudication).

¹⁴⁸ See Rachel Blustain, *New Push to Provide Legal Advice to Parents Facing Abuse and Neglect Investigations*, CITY LIMITS (Jan. 8, 2019), <https://citylimits.org/2019/01/08/new-push-to-provide-legal-advice-to-parents-facing-abuse-and-neglect-investigations> [<https://perma.cc/9W9D-SCNQ>] (explaining that, for some respondents in Bronx Family Court, child custody is more important than personal liberty).

¹⁴⁹ See *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (en banc) (citing courts in other jurisdictions that have also employed the analogy). While parent respondents in family court encounter

CPS has broad authority to investigate child neglect. It often deploys this authority in communities in which “neglect is usually hard to disentangle from poverty.”¹⁵⁰ The result is extensive state intervention into family life in which procedural safeguards are missing or unenforced. This practice breeds distrust between the government and community and harms families. When the state layers on the coercive power of law enforcement in the neglect area, it exacerbates these patterns.

2. Endangering the Welfare of a Child

In principle, parallel enforcement in child abuse and neglect cases only takes place when the conduct investigated by CPS involves a suspected crime.¹⁵¹ In reality though, New York prosecutors charge the class A misdemeanor of Endangering the Welfare of a Child (EWC) with considerable frequency. EWC has two main prongs, mirroring the civil abuse and neglect standards.¹⁵² A person is guilty under the abuse provision when “he or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child . . . or directs or authorizes such child to engage in occupation involving substantial risk of danger to his or her life or health.”¹⁵³ The second prong applies to parents, guardians, and PLRs who “fail[] or refuse[] to exercise reasonable diligence in the control of such child to prevent him or her from becoming an ‘abused child,’ ‘neglected child,’ ‘a juvenile delinquent,’ or a ‘person in need of supervision.’”¹⁵⁴ As the Court of Appeals has recognized, “[t]he statute is broadly written and imposes a criminal sanction for the mere ‘likelihood’ of harm.”¹⁵⁵

a. Explaining Criminalization

Both the police and district attorney play roles in criminalization. In a 2000 note, Alison B. Vreeland described the “criminalization of child welfare” in New York City.¹⁵⁶ In the 1990s, the New York City Police Department

significant difficulties, New York family courts have “consistently held that a child cannot be adjudged dependent if a fit parent is available to care for her.” Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 ALASKA L. REV. 173, 189-90 (2007) (endorsing New York’s approach with respect to the rights of nonoffending parents); see also, e.g., *In re Cheryl K.*, 484 N.Y.S.2d 476, 477 (Fam. Ct., Kings Cnty. 1985) (stating that a fit parent has a “superior right” to child custody relative to third parties).

¹⁵⁰ ROBERTS, *supra* note 81, at 34.

¹⁵¹ See SHEPPARD & ZANGRILLO, *supra* note 4, at 4.

¹⁵² N.Y. PENAL LAW § 260.10 (McKinney 2020); see also *supra* notes 83–84 and accompanying text.

¹⁵³ PENAL § 260.10(1).

¹⁵⁴ *Id.* § 260.10(2).

¹⁵⁵ *People v. Johnson*, 740 N.E.2d 1075, 1076 (N.Y. 2000).

¹⁵⁶ Alison B. Vreeland, Note, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 FORDHAM URB. L.J. 1053, 1053-54 (2000).

apparently automatically arrested parents in cases in which there was only evidence of potential child neglect, not abuse.¹⁵⁷ These included cases in which, for example, a mother left her child unsupervised for a brief period of time, in what is known as a “home alone” case.¹⁵⁸ This novel policing practice represented a departure from the traditional model, in which such low-level cases fell within the exclusive domain of CPS.¹⁵⁹

The pivot toward greater police involvement in this area had three main causes. First, high-profile child welfare failures where children died or were seriously harmed have spillover effects beyond CPS.¹⁶⁰ Like both CPS and family court judges, the police, too, have an incentive to pursue these cases as aggressively as possible, even if that means the de facto adoption of a “must arrest” policy reminiscent of the domestic violence context.¹⁶¹ Second, and relatedly, there was a perception in the legal community in the 1990s that law enforcement was more prepared to “take action” against abuse and neglect,¹⁶² perhaps due to the view that police officers are “tougher” than social workers.¹⁶³

¹⁵⁷ *Id.* at 1053-54, 1101-03.

¹⁵⁸ *See id.* at 1054 (describing this type of case); *People v. Cenat*, 671 N.Y.S.2d 578, 580 (N.Y.C. Crim. Ct., Kings Cnty. 1997) (“These cases range in severity from infants left unattended for hours while crack-addicted parents buy drugs, to eleven year old [sic] children left for a brief period while a single, working parent buys groceries.”); *People v. Smith*, 678 N.Y.S.2d 872, 875 (N.Y.C. Crim. Ct., Kings Cnty. 1998) (noting “an increasing number of these so called ‘home alone cases’, appearing in Criminal Court . . . charged under section one of P.L. § 260.10” and calling on the legislature “to clearly address the issue of whether it is the legislature’s intent to criminalize the act of leaving children under a specified age, home alone for a period of time”).

¹⁵⁹ *See Vreeland*, *supra* note 156, at 1053 (“Historically, the police have arrested and prosecuted parents and custodians for child abuse, including sexual abuse. But in cases of suspected neglect, [CPS] would respond”); *accord* ROBERTS, *supra* note 81, at 77 (“[P]olice are increasingly arresting parents even for minor instances of neglect that traditionally had been handled by child protective services.”).

¹⁶⁰ *See Vreeland*, *supra* note 156, at 1054 (“This new policy is, in part, a response to tragic, high-profiled child abuse cases where a child reported to the child welfare system died at the hands of her parents.”). For a discussion of the CPS side of this phenomenon, see *supra* notes 96-99 and accompanying text.

¹⁶¹ *See Vreeland*, *supra* note 156, at 1061 (“There is a growing sentiment that the police have actually expanded the ‘must arrest’ policy used in domestic violence cases to child welfare matters as well.”). New York currently requires police officers to arrest in certain domestic violence situations, although that statute is set to sunset in September 2021. *See* N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 2020); Act of June 30, 1994, ch. 222, § 59, 1994 N.Y. Laws 2704, 2720. *See generally* David Hirschel, Eve Buzawa, April Pattavina & Don Faggiani, *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 256-57, 292 (2007) (noting the three-decade expansion of mandatory arrest laws across the United States and concluding that they lead to more arrests).

¹⁶² *See* DEBRA WHITCOMB, *WHEN THE VICTIM IS A CHILD* 8 (2d ed. 1992) (referring to an American Bar Association study).

¹⁶³ *See supra* notes 61-66 and accompanying text (discussing the perception of police officers involved in child welfare cases). More contemporary arguments for greater police involvement with CPS include law enforcement’s capacity to respond to violence and access to databases containing more information about suspected child abusers. *See* Murray Weiss, *NYPD Could Fix ACS Problems and Save Abused Children’s*

The final issue relates to resources. As CPS experienced “soaring caseloads” in that era,¹⁶⁴ police were asked to help bear the burden of responding the child welfare issues.¹⁶⁵ Combined, these factors led to, and continue to fuel, law enforcement intervention in poverty-related neglect cases.

As a result of the push toward criminalization, the number of EWC charges rose and remains high. Between 1980 and 2017, EWC was one of the most commonly charged person-related misdemeanors, with the first prong charged a total of 121,790 times and the second prong charged 11,014 times.¹⁶⁶ Over one six-month span in 2017, EWC was charged 505 times in New York City.¹⁶⁷ This represented a decrease in charging at a rate faster than for similar misdemeanors over the prior four years, although this drop had all but ceased by 2017.¹⁶⁸ In general, this pattern accords with the sharp statewide decrease in arrests for person-related misdemeanors in the past decade.¹⁶⁹

b. *Blurred Lines Between Criminal and Family Court*

While technically belonging to a separate system, EWC complements CPS’ enforcement regime. When deciding to bring an EWC charge, prosecutors maintain their traditionally broad discretion.¹⁷⁰ That is to say, an earlier adverse finding resulting from a family court proceeding does not

Lives, Experts Say, DNAINFO (Feb. 10, 2017, 9:46 AM), <https://www.dnainfo.com/new-york/20170210/civic-center/nypd-administration-for-childrens-services> [https://perma.cc/8QK5-QLZM].

¹⁶⁴ WHITCOMB, *supra* note 162, at 8.

¹⁶⁵ See Weiss, *supra* note 163.

¹⁶⁶ MEREDITH PATTEN, QUINN O. HOOD, CECILIA LOW-WEINER, OLIVE LU, ERICA BOND, DAVID HATTEN & PREETI CHAUHAN, MISDEMEANOR JUST. PROJECT, TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 93 tbl.33 (2018). Section 260.10(1) charges represented 1.8% of person-related misdemeanors in New York City, 3.2% in upstate cities, and 7.7% in the rest of the state. *Id.* For § 260.10(2), these figures were 0.3%, 0.7%, and 0.5%, respectively. *Id.* There is one additional set of data in the report related to § 260.10 charges without further specification. See *id.* at 94 tbl.33.

¹⁶⁷ Jarrett Murphy, *Data Drop: Misdemeanor Arrests in New York City, 2013-2017*, CITY LIMITS (Oct. 17, 2017), <https://citylimits.org/2017/10/17/data-drop-misdemeanor-arrests-in-new-york-city-2013-2017> [https://perma.cc/9ZQE-8AJ8].

¹⁶⁸ See *id.* (showing a 23.37% decline in EWC charges over a six-month period compared to the previous four years, compared with smaller declines for Assault in the Third Degree (12.78%), Menacing in the Second Degree (6.18%), Aggravated Harassment in the Second Degree (20.34%), and Reckless Endangerment in the Second Degree (16.27%)). But see *id.* (showing a 1.78% decline in EWC charges over a six-month period compared only to the previous year, compared with declines for Assault in the Third Degree (8.50%), Menacing in the Second Degree (2.13%), Aggravated Harassment in the Second Degree (1.70%), and Reckless Endangerment in the Second Degree (11.54%)).

¹⁶⁹ See PATTEN ET AL., *supra* note 166, at 42 figs.34-36 (showing declines in person-related offenses in New York City, upstate cities, and the rest of the state starting around the year 2012).

¹⁷⁰ See generally MILLER & WRIGHT, *supra* note 147, at 146 (stating that local prosecutor’s “complete discretion to refuse to file charges or to dismiss charges after they had been filed” is today “the dominant position for most crimes in almost all jurisdictions”).

block the commencement of a criminal case.¹⁷¹ A parallel enforcement framework highlights the differences between the two systems, as explained by one criminal court in Manhattan:

[T]he Family Court serves a function very different from that of the Criminal Court. A child protective proceeding is civil in nature. Its purpose is to protect children from injury or mistreatment, safeguard their physical, mental, and emotional well-being, and insure the parent's right to due process of law. In contrast, the function of the criminal justice system is not just protection, but deterrence, rehabilitation and retribution. It provides an appropriate public response to the particular offense committed. The entry of a Family Court dispositional order, protective and rehabilitative in nature, does not serve the legitimate and necessary function of seeing that criminal behavior is both punished and deterred. Such a distinction requires the continuation of the penal process.¹⁷²

The supposedly parallel nature of the proceedings may additionally require parents facing proceedings in both systems to choose which rights to stand on.

Charging EWC enhances CPS enforcement. There is no right to remain silent in a CPS investigation.¹⁷³ Caseworkers (sometimes accompanied by the police) may ask a party under CPS investigation questions about arrests and the criminal case, even if a lawyer has already been assigned to that party as a defendant in criminal court, and may subsequently share that information with law enforcement.¹⁷⁴ Testifying in family court risks broadening criminal liability, because self-incriminating testimony offered in family court may

¹⁷¹ New York courts, including the Court of Appeals, have explicitly endorsed this position. See *People v. Roselle*, 643 N.E.2d 72, 76 (N.Y. 1994) (“[N]o legally cognizable identity of issues exists between the child protective proceeding, which seeks to safeguard the child, and a criminal action, which yields a final determination conclusive of defendant’s penal responsibility . . .”); *People v. Daniels*, 598 N.Y.S.2d 790, 791 (App. Div. 1993) (stating that there was no double jeopardy bar to criminal prosecution for sodomy following a family court proceeding because of the latter’s civil nature); *People v. Berrios*, 610 N.Y.S.2d 748, 749–50 (N.Y.C. Crim. Ct., New York Cnty. 1994) (denying defendants’ motion for a dismissal of an EWC complaint “in furtherance of justice” after a family court proceeding had resulted in a finding a physical abuse and removal of the child victim from the home).

¹⁷² *Berrios*, 610 N.Y.S.2d at 751 (citations omitted).

¹⁷³ See CIV. ACTION PRAC. OF THE BRONX DEFS., *supra* note 70, at 40 (“Criminal practitioners must understand that—despite being represented by counsel in criminal court or beyond—there is no legally recognized prohibition on municipal child protective workers’ ability to question your clients fully about the circumstances of their arrests, the allegations, or the criminal charges.”) (emphasis omitted).

¹⁷⁴ See *id.* at 40–41 (“[C]lients will be asked to make admissions about every detail concerning their criminal cases and will often make admissions that can later be used against them in their criminal cases.”); see also Cook, *supra* note 25, at 366 (noting that information obtained from Texas CPS may come within the purview of the Fifth Amendment, but that this hinges on how the CPS agent is categorized).

later be used at a criminal trial.¹⁷⁵ At the same time, because the family court proceeding is a civil one, the court may interpret silence as a basis for making an adverse inference against the respondent, thereby diminishing the chances for a favorable outcome in the abuse and neglect proceeding.¹⁷⁶ In this “world where parallel lines converge,” Professor William Wesley Patton has criticized a system in which parents seeking family reunification at either a factfinding hearing or as a result of the disposition of the civil proceeding may be required to inculcate themselves and thereby face the “threat of criminal reprisal.”¹⁷⁷ Finally, when criminal charges stem from the same conduct that leads CPS to start a family court case, a conviction in criminal court could result, depending on how the record is developed, in the family court granting summary judgment to the state on the abuse or neglect petition.¹⁷⁸

Although EWC is a misdemeanor, successful prosecution can be highly consequential. First, as a class A misdemeanor, EWC carries a maximum sentence of 364 days in jail.¹⁷⁹ As such, conviction in criminal court may result in the separation of a parent from her child even in the absence of an abuse or neglect finding in family court; indeed, in 2013, the Children’s Bureau of the U.S. Department of Health and Human Services conservatively estimated that 19,858 children entered foster care because of parental incarceration (not necessarily related to child abuse or neglect).¹⁸⁰ Second, in the more likely

¹⁷⁵ See, e.g., *In re Emily I.*, 854 N.Y.S.2d 792, 793 (App. Div. 2008) (“It is within the discretion of Family Court whether to permit an abuse petition to proceed despite the pendency of a criminal action against the respondent and the concomitant chilling effect the pending criminal action may have on the respondent’s decision whether to testify in the abuse proceeding . . .”); see also Solomon, *supra* note 135, § 2:35 (surveying cases and noting that the state criminal appellate courts have been consistent in rejecting defendants’ claims that concurrent family court proceedings should not continue until the completion of the criminal case).

¹⁷⁶ See *Comm’r of Soc. Servs. v. Philip De G.*, 450 N.E.2d 681, 683 (N.Y. 1983) (“[I]t is now established that in civil proceedings an inference may be drawn against the witness because of his failure to testify . . .”).

¹⁷⁷ Patton, *supra* note 25, at 473, 475-76, 523-24.

¹⁷⁸ See, e.g., *In re Lilliana K.*, 107 N.Y.S.3d 462, 463-64 (App. Div. 2019) (affirming family court’s grant of summary judgment for CPS in an Article 10 proceeding following an EWC conviction because “the identical issue” was already litigated in criminal court and the respondent “had a full and fair opportunity to litigate” the criminal matter); *In re Denise “GG”*, 678 N.Y.S.2d 821, 822 (App. Div. 1998) (affirming the application of collateral estoppel in family court after the respondent had already pleaded guilty in the criminal case to crimes stemming from the same underlying conduct); accord CIV. ACTION PRAC. OF THE BRONX DEFS., *supra* note 70, at 43 (“If the allegations in the criminal case are the same as those in the Family Court case, remember that a guilty plea, depending on the allocation, could mean an automatic finding of neglect or abuse in criminal court.”).

¹⁷⁹ N.Y. PENAL LAW § 70.15(1) (McKinney 2020).

¹⁸⁰ CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE WITH FAMILIES AFFECTED BY PARENTAL INCARCERATION 3 (2015). Nationally, parents facing longer periods of time in prison risk the termination of parental rights even absent a finding of child abuse and neglect because “AFSA requires States to file for the termination of the parental rights for any child who has been abandoned or in foster care for 15 of the most recent 22

scenario that a parent does not spend time in jail, the record of an arrest or conviction for EWC will carry collateral consequences for the parent, including the potential loss of or ineligibility for employment.¹⁸¹ These consequences threaten to exacerbate the underlying poverty that led to a conviction for neglect in the first place, and thereby make future interaction with the child welfare system more likely.¹⁸² Finally, law enforcement involvement will implicate CPS. When a defendant is charged with EWC or “any crime that may have put her children at risk,” a CPS investigation or petition in family court is “likely” to follow (if one does not already exist).¹⁸³

c. *Separate but Not Apart*

The use of EWC problematizes the idea of parallel enforcement. For one, the state is willing to invoke a parallel enforcement rationale when justifying the involvement of two systems. In turn, it may use Article 10 (CPS) and EWC (law enforcement) to produce compounding penalties for the same conduct. Perhaps more troublesome is the use of parallel enforcement to give the government two bites at the apple, allowing it to use one system as a fallback should it be initially unsuccessful in either one. However, upon closer investigation, one sees that the systems do not function as separately as the legal rationale for their dual existence suggests they would.

At the heart of parallel enforcement is the concept of separateness. Fundamentally, because the systems are separate, the state may pursue two cases, one civil and one criminal. Ironically, though, a rationale predicated on separateness simultaneously provides a legal basis for crossover between the systems on the ground. The sharing and borrowing of investigative resources,

months.” *Id.* at 4; cf. Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 2, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [https://perma.cc/DX3A-7CLC] (“[A]t least 32,000 incarcerated parents since 2006 had their children permanently taken from them without being accused of physical or sexual abuse, though other factors, often related to their poverty, may have been involved.”). Professor Roberts also observes how AFSA’s encouragement of child adoption further “weakens the chances of family preservation.” See Roberts, *supra* note 117, at 1498–99. New York provides an exception to AFSA’s 15/22 requirement for incarcerated parents. See N.Y. SOC. SERV. LAW § 384-B(3)(l)(i)(D) (McKinney 2020); accord CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., *supra*, at 4.

¹⁸¹ See CIV. ACTION PRAC. OF THE BRONX DEFS., *supra* note 70, at 30–38 (describing wide-ranging employment consequences following an arrest and/or conviction in New York).

¹⁸² See ROBERTS, *supra* note 81, at 181–82 (describing the overlap of families receiving welfare and families involved with the child welfare system); see also Vreeland, *supra* note 156, at 1084 (“[P]arents who face poverty will be less likely to reach out and ask for assistance and services if they feel that drawing attention to themselves will leave them vulnerable to arrest.”).

¹⁸³ CIV. ACTION PRAC. OF THE BRONX DEFS., *supra* note 70, at 39. Additional circumstances unrelated to EWC but that relate to any other criminal activity involving a parent (e.g., if a child was in the home at the same time the parent engaged in a crime) can also trigger a CPS investigation. *Id.* at 42.

evidence, and even judgments render the high-level distinctions between the two systems academic. Critically, these practices are not a betrayal of parallel enforcement, but a product of the idea “two systems.” For example, a prosecutor could not use an EWC conviction to obtain a subsequent criminal conviction, but by taking that result into the nominally civil family court, the government may altogether preclude the respondent from challenging CPS’ case.¹⁸⁴

The end effect is that the systems frequently work hand in hand to achieve similar goals, including the temporary, long-term, or permanent removal of the child from the parent. As such, while the day-to-day work of CPS and the police may result in conflict due to different philosophical underpinnings (among other factors), the legal regimes of family law and criminal law each become more coercive in the child welfare setting when they are allowed to rely on one another. Thus, while system clash can have a negative effect on child welfare, the risk to children may indeed be greater when the two work closely together, at least when it comes to the pursuit of poverty-related neglect cases.

3. A Return to CPS

What is now needed is a clearer definition of roles for each system based on their respective responsibilities and competencies. Simply put, this degree of state power is unnecessary in responding to child neglect. Twenty years ago, Vreeland argued that CPS and the family court were best suited to “address the problem of neglect because under the child protection system, the child’s constitutional right to the parent-child relationship is best considered and protected.”¹⁸⁵ In principle, this conclusion is true: where the child welfare system is governed by statutes explicitly concerned with the “best interests of the child,” law enforcement has its own set of priorities.¹⁸⁶

Another factor to consider is that CPS possesses a wider range of tools to address the underlying causes of poverty that often lead to enforcement actions in one or both systems.¹⁸⁷ This is especially true for preventative

¹⁸⁴ See *supra* note 178 and accompanying text (providing examples of how the criminal court judgement may preclude a parent’s defense in family court).

¹⁸⁵ Vreeland, *supra* note 156, at 1097.

¹⁸⁶ See *supra* notes 49–51 and accompanying text (summarizing the relevant legal authority on family reunification standards).

¹⁸⁷ In addition to safety plans concluded outside of family court, CPS has other less coercive methods at its disposal. For example, local child welfare agencies are authorized to create a second track of enforcement, or “differential response program.” See N.Y. SOC. SERV. LAW § 427-A(1) (McKinney 2020). The purpose of this additional track—called the “Family Assessment Response” (FAR)—is to serve “as an alternative means of addressing certain matters otherwise investigated as allegations of child abuse or maltreatment.” *Id.* FAR is explicitly designed for low-level cases (i.e., allegations of sexual, physical, or severe or repeated abuse are excluded) and for situations in which the child is not in an unsafe situation. See *id.* §§ 427-A(3)(a), (4)(c)(ii). FAR is designed to be a more cooperative and “flexible” response to problems within the family; as such, “[f]amilies are

services, such as parenting skills courses, which the district attorney or criminal court are only able to mandate after conviction.¹⁸⁸ A renewed focus on preventative services by CPS in neglect cases would reduce both the individual and systemic consequences associated with overenforcement and also better align New York with prevailing federal policy. In particular, the recently passed Family First Prevention Services Act,¹⁸⁹ in the words of two commentators, “aims to prevent children from entering foster care by allowing federal reimbursement for mental health services, substance use treatment, and in-home parenting skill training.”¹⁹⁰ The law does this by redirecting most Social Security Act Title IV-E funds away from foster care and toward these three large buckets of preventative services.¹⁹¹

Returning neglect cases to CPS’ domain will require some significant changes to the current parallel enforcement regime. Vreeland’s proposal to have CPS and family court “address the problem of neglect” still preserves a prominent role for law enforcement, as she writes: “Law enforcement should certainly play a role because child endangerment is a crime.”¹⁹² But the fact that a pattern of neglect might technically fit into the broad statutory EWC definition¹⁹³ ought not to be considered a compelling reason to deploy the coercive force of law enforcement in dealing with such cases—with potentially severe collateral consequences—when CPS and family court are better equipped to deal with the underlying problem (or in cases in which reunification is not feasible, to move toward removal or the termination of parental rights).

treated as partners and are approached in a solution focused manner, such as calling parents to arrange a time to meet with the family instead of making an unannounced home visit.” CPS MANUAL, *supra* note 15, at ch. 5 A-1. Since FAR seeks to connect families with services, “[t]here is no formal determination of whether child maltreatment occurred.” *Id.*

¹⁸⁸ See, e.g., *People v. Muhammad*, No. 2005QN060622, 2006 N.Y. Misc. LEXIS 4097, at *1 (N.Y.C. Crim. Ct., Queens Cnty. June 8, 2006) (showing that after having been charged with EWC and other charges related to physical abuse and pleading guilty to a different charge, the defendant was sentenced to a parenting skills course). An exception to this rule is the possibility of pretrial diversion to a program like parenting skills, in which case a criminal disposition is not reached. See generally MILLER & WRIGHT, *supra* note 147, at 149 (explaining that the prosecutor will decline to file or drop charges after the criminal defendant completes the diversion program).

¹⁸⁹ See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, §§ 50701-50782, 132 Stat. 64, 232-68.

¹⁹⁰ Kristen Torres & Richa Mathur, *Fact Sheet: Family First Prevention Services Act*, FIRST FOCUS: CAMPAIGN FOR CHILD. (Mar. 9, 2018), <https://campaignforchildren.org/resources/fact-sheet/fact-sheet-family-first-prevention-services-act> [<https://perma.cc/E7AH-EYBS>].

¹⁹¹ Bipartisan Budget Act of 2018 § 50711; see also Fabiola Villalpando, Legislative Update, *Family First Prevention Services Act: An Overhaul of National Child Welfare Policies*, 39 CHILD.’S LEGAL RTS. J. 283, 283-85 (2019). But see *id.* at 285-86 (summarizing some early concerns with the law).

¹⁹² Vreeland, *supra* note 156, at 1097.

¹⁹³ See *People v. Johnson*, 740 N.E.2d 1075, 1076 (N.Y. 2000) (recognizing the breadth of the EWC statute).

Vreeland does not object to the continued involvement of law enforcement at the investigation stage.¹⁹⁴ Rather, the author argues that

social workers should be included in criminal investigations of child neglect to make sure that the child is considered at all stages. Police and caseworkers together conduct a thorough investigation. Caseworkers often employ the assistance of police when making home visits or removing children in order to ensure the safety of everyone involved.¹⁹⁵

In sum, Vreeland believes that “[t]he problem is what happens *after* the arrest.”¹⁹⁶ However, the criminalization of child welfare is indeed a problem well before the arrest stage, as families come to view CPS as a form of police-lite, thereby cutting them off from the anti-poverty resources they need.¹⁹⁷ Nor are parents under CPS investigation incorrect in their cognitive blending of CPS and law enforcement. While the case law in New York appears to fully embrace the logic of parallel enforcement in justifying the involvement of two often-duplicative systems, the practical reality is that the two often combine resources to strengthen each other and achieve more aggressive punishments against parents in one or both forums.¹⁹⁸

Some cases of neglect should remain in the criminal system, but in instances in which there is no actual harm to the child or the harm is a product of the caregiver’s poverty, separation of the systems is appropriate. Vreeland’s proposal maintains the troublesome mixing of the agencies’ roles in these cases.¹⁹⁹ In short, “mak[ing] sure that the child is considered at all stages”²⁰⁰ would often mean not pursuing the prototypical home alone-type criminal neglect case in the first place. Neglect cases should be almost exclusively pursued by CPS, which is better suited to offer preventative services, work with families, and seek more targeted remedies in family court if necessary.²⁰¹

¹⁹⁴ Vreeland, *supra* note 156, at 1097.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* notes 115–17 and accompanying text (explaining how caregivers may avoid contact with doctors and teachers and how children are cut off from potential channels of support).

¹⁹⁸ See *supra* subsection II.A.2.c (explaining how the two legal regimes combine to strengthen each other).

¹⁹⁹ See Vreeland, *supra* note 156, at 1097 (explaining the desirability of law enforcement working with CPS and observing that CPS often calls upon law enforcement for assistance).

²⁰⁰ *Id.*

²⁰¹ See, e.g., CASEY FAM. PROGRAMS, ASSESSMENT OF NEW YORK CITY ADMINISTRATION FOR CHILDREN’S SERVICES SAFETY PRACTICE AND INITIATIVES 12–15 (2017) (describing New York City ACS as a “national leader in investing in the continuum of preventative services and supports” through a wide range of different programs and concluding that child maltreatment is reduced during and after family participation in these programs); see also *id.* at 22 (noting that New York State has also “made significant and sustained investments in preventative services over the past two decades” which have contributed to a decline in the number of children in foster care).

Criminal prosecution is a powerful but blunt instrument, and it would be more effective for law enforcement to deploy it toward a more pressing societal issue: child abuse.

B. *Underenforcement in Abuse Cases*

Although prosecuting EWC in the neglect context may compound the effects of an aggressive child welfare system, prosecuting crimes against children does play a key role in protecting child welfare. However, the government's enforcement capacity is limited in the more serious cases of physical or sexual abuse, where the state cannot fully defend the rights of the child victim because the child's nonoffending caregiver often holds a de facto veto over the prosecution of the defendant. By refusing to work with law enforcement, the nonoffending caregiver may effectively end the case against the abuser, who remains free to continue the abuse of the child.

In this Part, I argue that the source of this noncooperation is often misunderstood; rather than categorically representing bad parenting, it may also be a byproduct of the unclear boundaries between law enforcement and CPS. By reframing and appreciating the concerns of the nonoffending caregiver, the prosecutor may be able to develop a working relationship with the victim and caregiver, increasing the likelihood of a successful prosecution. Critically, obtaining the nonoffending caregiver's cooperation will require the government to wall off law enforcement from CPS in certain instances, providing certainty where it has thus far remained elusive.

1. Taking Child Abuse Seriously

The prosecution of child abuse is an essential function for a district attorney. First, child abuse remains a serious problem in New York and nationally.²⁰² In particular, the ongoing coronavirus pandemic has raised concerns that, with families locked inside their homes, child abuse is both becoming more severe and less frequently reported.²⁰³ As such, deploying the coercive power of the

²⁰² See CHILD MALTREATMENT 2018, *supra* note 94, at 40 tbl.3-8 (showing that in New York in FFY 2018, there were 570 unique child victims of physical abuse only, but 27,546 unique child victims of multiple forms of maltreatment, including medical neglect, neglect, psychological maltreatment, and sexual abuse).

²⁰³ Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities Are Very Worried.*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html> [<https://perma.cc/5BZ7-97K7>] (Aug. 7, 2020) (explaining that pandemic-related lockdowns designed to protect health and safety have the perverse effect of locking at-risk children into unsafe homes); see also Samantha Schmidt & Hannah Natanson, *With Kids Stuck at Home, ER Doctors See More Severe Cases of Child Abuse*, WASH. POST (Apr. 30, 2020, 7:00 AM), <https://www.washingtonpost.com/education/2020/04/30/child-abuse-reports-coronavirus> [<https://perma.cc/J8KE-9754>] (explaining that the cases that do end up on the authorities' radar involve more serious cases of physical abuse).

state to prosecute crimes against children may deter child abuse and send a powerful signal about how society expects adults to treat children and protect their “physical health, morals and well-being.”²⁰⁴ Second, law enforcement has greater legal reach than CPS because CPS’ authority is generally limited to the family setting.²⁰⁵ As such, CPS plays a role in extra-familial matters only when it is pursuing a case against a parent or PLR on a theory of derivative neglect.²⁰⁶ When it comes to responding to these more severe cases, only law enforcement can vindicate the rights of the child victim and ought not tolerate a nonoffending parent’s interference with the investigation.

a. *The Case of the Child Victim*

Prosecuting EWC against a non-family member is hugely challenging because it requires (1) sensitivity towards the unique needs of the child victim, (2) navigating evidentiary difficulties, particularly those related to the child’s testimony, and, critically, (3) the cooperation of the child’s caregiver. These related issues make meeting the legal standard of proof beyond a reasonable doubt very difficult, and as a result, the district attorney may decline to prosecute the case.²⁰⁷ Nevertheless, in pursuing cases against non-family

requiring hospitalization); Julia Ingram, *Has Child Abuse Surged Under COVID-19? Despite Alarming Stories from ERs, There’s No Answer*, NBC NEWS (July 27, 2020, 11:24 AM), <https://www.nbcnews.com/health/kids-health/has-child-abuse-surged-under-covid-19-despite-alarming-stories-n1234713> [<https://perma.cc/7JH5-Z7AE>] (surveying forty-four jurisdictions and finding an average 40.6% decrease in reports from April 2019 to April 2020). The crisis has similarly made it more difficult for CPS workers to carry out routine tasks, directly jeopardizing the safety of at-risk children. See Garrett Therolf, Daniel Lempres & Aksaule Alzhan, *They’re Children at Risk of Abuse, and Their Caseworkers Are Stuck at Home*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/us/virus-child-abuse.html> [<https://perma.cc/EWB9-V2HY>] (explaining that caseworkers “have stopped performing a broad range of essential duties” because of virus fears). Due to the lack of reporting, there is also concern that speculation about increases in child abuse will result in heavier intervention into families in marginalized communities. See Hager, *supra* note 96 (explaining the fear of some experts that “hypothesizing” about unreported increases in child abuse will lead to more punitive actions against poor families of color).

²⁰⁴ See *People v. Bergerson*, 218 N.E.2d 288, 289 (N.Y. 1966) (explaining the purpose of the EWC statute in its former form, which is very similar to the current EWC statute); *People v. Berrios*, 610 N.Y.S.2d 748, 751 (N.Y.C. Crim. Ct., New York Cnty. 1994) (“In contrast [to Family Court], the function of the criminal justice system is not just protection, but deterrence, rehabilitation and retribution.”); *People v. Doe*, 521 N.Y.S.2d 636, 638 (N.Y.C. Crim. Ct., New York Cnty. 1987) (“[T]he role of the court as a protector of young children . . . [is] a role as essential as protecting the rights of the accused.”).

²⁰⁵ See *supra* note 7 and accompanying text.

²⁰⁶ See *infra* notes 242–43 and accompanying text.

²⁰⁷ See INST. OF MED. & NAT’L RSCH. COUNCIL, *supra* note 3, at 59 (“On the criminal side, charges are not filed in many cases, even when prosecutors may believe a crime occurred, because of difficulties entailed in proving the case and in meeting the legal standard of proof beyond a reasonable doubt.”).

members, law enforcement can effectively target a small but significant minority of all child abuse cases brought into the criminal system.²⁰⁸

That prosecutors need to work closely with children who have been victimized implicates a special set of considerations. First, children are particularly vulnerable members of society and possess limited autonomy.²⁰⁹ A child's victimization may have consequences of different severities, ranging from experiencing feelings of guilt to behaving violently.²¹⁰ Second and relatedly, the need to give testimony several times can have long-term, traumatizing effects on the child victim.²¹¹ This concern is elevated when the child knows and has come to trust the defendant, who may live or interact regularly with the child (even if the two are not legally-recognized family members).²¹² Likewise, the child victim is understandably nervous and worried; while the CAC might be designed for a child, a prosecutor's office or criminal court is a stressful environment.²¹³ Third, the child's cognitive capacity, defined by factors such as a "limited understanding of space, distance, and time," short attention span, or discomfort with strangers, is "common[ly]" limited and may impede the victim's ability to provide the prosecutor with information that can be used in a formal proceeding.²¹⁴ These issues may magnify the scope of the prosecutor's next major hurdle: evidence.

The evidentiary issues in a child abuse prosecution are manifold, and the challenges often begin with the child's testimony.²¹⁵ In New York, children aged nine and older are presumptively permitted to be able to testify under oath; for younger children, "the court [must be] satisfied that he or she

208 In FFY 2018, 13.4% of child victims were abused or neglected by a nonparent. These included other relatives (4.7% of all perpetrators) and a parent's unmarried partner (2.8%). CHILD MALTREATMENT 2018, *supra* note 94, at 22.

209 See *supra* note 12 and accompanying text.

210 See WHITCOMB, *supra* note 162, at 18-19 (giving examples of behavior that children exhibit as a reaction to victimization).

211 This was a major factor behind the creation of MDTs and CACs. See *How the CAC Model Works*, *supra* note 27 (discussing the desire to avoid re-traumatization of children during investigations).

212 See Catherine Tinker, *Child Abuse: A Practitioner's Guide to the Trial of Child Abuse Cases in Criminal Court*, 4 NYLS J. HUM. RTS. 55, 61 (1986) ("The potential for damage to a delicate and already wounded child is tremendous, and may increase each time the child is forced to repeat his or her story about how a loved adult abused him or her.").

213 See *id.* at 62-63; see also WHITCOMB, *supra* note 162, at 18 (recounting a story in which a child witness revealed to a therapist that she feared the judge would hit her with the gavel, which the child described as a "hammer").

214 See WHITCOMB, *supra* note 162, at 16 (listing additional factors related to a child's cognitive capacity including an illogical organization of thoughts or "complex understanding of truth and lying"). As the author explains, while some of these issues may dissipate in older age groups, new issues related to cognitive capacity might emerge, such as children using their expanded vocabulary in imprecise ways. *Id.*

215 See Theodore P. Cross & Debra Whitcomb, *The Practice of Prosecuting Child Maltreatment: Results of an Online Survey of Prosecutors*, 69 CHILD ABUSE & NEGLECT 20, 20 (2017) ("[S]o much of the effort to prove abuse in court rests on the child's testimony.").

understands the nature of an oath.”²¹⁶ In order to proceed with a case based on the testimony of a child younger than nine, then, a diligent prosecutor must make an assessment of the child victim’s capacity to give testimony, a challenge the defendant will inevitably raise in a pretrial motion.²¹⁷ The prosecutor usually attempts to safeguard the case against future challenges to the child’s capacity to swear an oath by conducting a recorded voir dire of the child (before the child witness signs the supporting deposition) and personally signing an affidavit attesting to the child’s capacity, both of which can later be presented to the court and defense.²¹⁸ If the prosecutor determines and the judge agrees that the child witness can swear an oath, the child will be able to give testimony like any other competent adult witness;²¹⁹ if the child witness cannot swear an oath under the relevant statutory requirement, then the prosecutor must rely upon other witnesses, who might not even exist, in order to advance the case—a considerably more difficult, if not impossible, task. After all, “[t]he testimony of the child victim of abuse will be the only direct evidence in most child abuse trials.”²²⁰

²¹⁶ N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2020). The so-called “swearability” of a child witness is an issue long before the prosecutor even considers taking a case to trial. In New York, the hearsay components of a misdemeanor complaint (such as one charging EWC) must be “converted” into an “information,” which formally charges the offense. *See id.* § 100.10(1); *People v. Soler*, 544 N.Y.S.2d 287, 288-90 (N.Y.C. Crim. Ct., Kings Cnty. 1989). To achieve conversion, the prosecutor may verify the complaint in any number of ways—all of which rely upon the witness swearing an oath—including obtaining a signed supporting deposition which informs the witness of the risk of committing perjury. CRIM. PROC. § 100.30. After initiating the action, the prosecutor has a strictly enforced ninety-day window to convert the complaint. *Id.* § 30.30(1)(b); *see e.g.*, *People v. Akramov*, 124 N.Y.S.3d 639, 640-41 (N.Y.C. Crim. Ct., Kings Cnty. Mar. 3, 2020) (demonstrating how a criminal court will calculate the number of days used by the government in preparing for trial and dismissing the charges after ninety-five “chargeable” days elapsed). Speedy trial motions pursuant to section 30.30 often represent the formal basis upon which the judge will dismiss a case on the basis of a missing “jurisdictionally sufficient accusatory instrument.” *See, e.g.*, *People v. Seward*, 662 N.Y.S.2d 731, 732 (Mount Vernon, N.Y. City Ct. 1997).

²¹⁷ The district attorney is not legally mandated to make such a determination, but without doing so, leaves the case vulnerable to a defendant’s motion to dismiss if the child’s testimony is needed to make out the prima facie case. *See People v. Phillipe*, 538 N.Y.S.2d 400, 406 (N.Y.C. Crim. Ct., Kings Cnty. 1989) (“[S]everal recent cases have fashioned unique but differing verification requirements for child witnesses. Each case requires an examination of the child witness not explicitly required by the verification statute, in order to complete or perfect the act of verification. Their varied approaches have caused some confusion . . . especially among prosecutors.”) (citations omitted).

²¹⁸ *See Soler*, 544 N.Y.S.2d at 290 (prescribing this procedure involving a recorded voir dire and affidavit from the prosecutor); *see also People v. Richard*, 929 N.Y.S.2d 723, 728 (N.Y.C. Crim. Ct., Kings Cnty. 2011) (“For many years, courts have accepted the procedure described in *Soler* since ‘(t)his method satisfies due process and sufficiently protects Defendant’s rights because the Court, and not the prosecutor, determine [sic] whether the Witness is able to swear to the Complaint.’”) (citation omitted).

²¹⁹ *See Tinker*, *supra* note 212, at 68 (“The testimony of any child who is found to be capable of taking the oath by a judge shall be given the same weight as the testimony of any adult witness.”).

²²⁰ *Id.* at 76.

Recognizing the difficulties associated with children's testimony, legislators around the country attempted to introduce measures to make it easier for child witnesses to give testimony.²²¹ Depending on the state, children were allowed to testify via closed-circuit television, courtroom audiences could be limited, and new hearsay exceptions to the introduction of the child's out-of-court statements came into force.²²² In 1985, New York passed an experimental law, which remains on the books today, that allows the district attorney to move to have the child witnesses declared "vulnerable," in which the judge must determine "that it is likely that such child witness will suffer serious mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television" in the context of sex crimes.²²³

Subsequently, the U.S. Supreme Court limited the states' ability to employ these accommodation tools.²²⁴ In particular, the Court's 2004 decision in *Crawford v. Washington* generally prohibited the use of out-of-court testimonial statements at trial if the witness is unavailable.²²⁵ This has directly implicated

221 See Cross & Whitcomb, *supra* note 215, at 21 (describing protective measures enacted by legislatures "intended to support and protect child victims who testify in court").

222 *Id.* Evidence from the around the country suggests that these measures are rarely used in practice. *Id.*

223 N.Y. CRIM. PROC. LAW § 65.10(1) (McKinney 2020); *accord id.* § 65.00(1) (defining the relevant sex crimes); see also *People v. Cintron*, 551 N.E.2d 561, 564 (N.Y. 1990) (interpreting a stricter, older version of the statute governing the use of "live two-way closed-circuit television in sex crime cases" involving a child witness and affirming its facial validity under certain narrow circumstances). The experimental law sunsets in September 2021. See Act of July 24, 1985, ch. 505, § 5, 1985 N.Y. Laws 2570, 2574.

224 See *Coy v. Iowa*, 487 U.S. 1012, 1020-21 (1988) (Scalia, J.) (holding that the placement of a screen between a defendant and child witnesses violated the Confrontation Clause but leaving open the possibility that certain exceptions to the requirement that the defendant must be permitted to literally face the witness could exist). *But cf.* *Maryland v. Craig*, 497 U.S. 836, 851-57 (1990) (O'Connor, J.) (holding that the use of one-way closed-circuit television that prevents the witness from seeing the defendant is permitted if it "further[s] an important state interest," but that there must be more than a de minimis showing that the child would suffer emotional distress as a result of being around the defendant). For a conclusion that the need to balance child protection against the rights of the accused "has lowered the feasibility of introducing innovative practices in the courtroom," see generally Ashley Fansher & Rolando V. del Carmen, "The Child as Witness": *Evaluating State Statutes on the Court's Most Vulnerable Population*, 36 CHILD.'S LEGAL RTS. J. 1, 2 (2016).

225 See *Crawford v. Washington*, 541 U.S. 36, 50-54 (2004) (Scalia, J.). If a court determines as a threshold matter that the child's statements are not testimonial, then *Crawford* will not bar the admission of such a statement. In *Ohio v. Clark*, 135 S. Ct. 2173 (2015), the Court distinguished *Crawford* on the basis that the child victim identified his mother's boyfriend as the perpetrator to his preschool teachers, not the police, after his teachers discovered injuries on the child. *Id.* at 2180-82. In its evaluation of the relevant circumstances surrounding the child's disclosure, the Court noted that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause." *Id.* at 2182. Children's nontestimonial hearsay may still come into evidence on the basis of recognized hearsay exceptions. See *id.* at 2178, 2182 (concluding that the Sixth Amendment did not bar the admission of the child victim's statements by the trial court, which had applied an Ohio statute allowing for the admission of hearsay by child victims); *People v. Hernandez*, 65 N.E.3d 1272, 1273 (N.Y. 2016) (allowing

the use of MDTs and CACs, since a structured interview with the child victim is considered testimonial; as such, in order for the government to use that evidence at trial, *Crawford* demands that the child be present.²²⁶ As Professor Myrna Raeder explains, “[p]ost-*Crawford*, if a child does not testify, the chances of winning at trial plummet because significant types of child hearsay will be eliminated.”²²⁷ More fundamentally, in cases in which the child cannot or will not testify, prosecutors are unlikely to even pursue cases in which they would have formerly been able to rely on child hearsay.²²⁸ As two commentators have noted, the post-*Crawford* landscape is somewhat bewildering for prosecutors: although many of these cases begin with the child making an honest disclosure to a mandatory reporter, “the most reliable hearsay evidence is the least likely to be admitted, because structured interviews that are captured on videotape are most likely to be deemed testimonial.”²²⁹

Finally, even if the child does testify at trial, the defense may try to impeach the child witness, a task which will be made easier if the child discloses the

for a three-year-old’s disclosure to her parents shortly after the child was sexually abused on a bus to be admitted as evidence under the excited utterance exception); *People v. Duhs*, 947 N.E.2d 617, 618 (N.Y. 2011) (holding that a three-year-old’s disclosure to a pediatrician that his mother’s boyfriend would not let the victim out of a tub of “scalding hot water” was not testimonial and could come into evidence in the doctor’s testimony under the medical diagnosis and treatment exception).

²²⁶ The prosecution may still be able to bring in the testimonial hearsay only if it can prove that the child witness is unavailable and that the defense had a “prior opportunity” for cross-examination. *Crawford*, 541 U.S. at 53-56; accord *DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE* 732 (4th ed. 2018). In practice, the latter requirement makes it very difficult for the government to admit testimonial hearsay in this way, particularly when an MDT or CAC has been used. See MERRITT & SIMMONS, *supra*, at 754-55 (“As a practical matter, the requirement of prior cross-examination excludes most testimonial hearsay—unless the declarant also appears at trial to testify.”); Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 381-83 (2005) (“[S]tatements made to multidisciplinary teams will not be admitted unless the child testifies.”).

²²⁷ Raeder, *supra* note 226, at 383. Scholars have reached different conclusions regarding *Crawford*’s effect on practice. Compare *id.* at 311 (“*Crawford*’s testimonial approach has had a dramatic impact on domestic violence and child abuse cases.”), with Cross & Whitcomb, *supra* note 215, at 21 (arguing that the full impact of *Crawford* is “not entirely clear” because research has largely focused on case law and not on actual prosecutorial practice).

²²⁸ See Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181, 1189 (2012) (“*Crawford* has changed the nature of the cases that prosecutors choose to pursue, rendering its full effects invisible to readers of the appellate reports.”).

²²⁹ *Id.* at 1190.

abuse in stages or to a source found to be supportive of the child, or if the victim has recanted.²³⁰ In general, jurors are less likely to find children credible.²³¹

b. *The Uncooperative Caregiver*

The decision about whether a child victim will testify can easily be outcome determinative for the prosecution.²³² To pursue a criminal case, it is important for the prosecutor to maintain some relationship with the victim for basic reasons, such as scheduling interviews and trial, as well as more complicated ones, such as offering reassurance that the district attorney is validating the victim's desire for justice.²³³ In the case of a child victim, this requires the cooperation of the victim's current caregiver. Following the defendant's arrest and arraignment, the criminal court will usually enter an order of protection against the defendant to stay away from the child victim; if the defendant is the child's parent or PLR, the child will be removed from the allegedly abusive adult's care pending resolution of the case.²³⁴

As the case progresses, the child's nonoffending caregiver may refuse to cooperate with the prosecutor, leading to problems that may cause the case's

²³⁰ See *People v. Jones*, 714 N.Y.S.2d 876, 879 (N.Y.C. Crim. Ct., Kings Cnty. 2000) (explaining that the defendant retains the ability to cross-examine the child witness with respect to the manner in which the police interviewed the child and the possibility of "nefarious motives"); Raeder, *supra* note 226, at 375 ("The fact that children disclose in stages also increases the likelihood of inconsistencies in the child's testimony. . . . Thus, the testimony of young children is viewed more skeptically by jurors than that of adults because of concerns over suggestibility, manipulation, coaching, or confusing fact with fantasy."). Additionally, an abuse of the discovery process by defense attorneys may "revictimiz[e]" the child. See Claire Chiamulera, *Representing Child Abuse Victims: Criminal Court Strategies*, AM. BAR ASS'N (June 5, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/videos/representing-child-abuse-victims--criminal-court-strategies [<https://perma.cc/N5S8-PHSE>].

²³¹ See WHITCOMB, *supra* note 162, at 26 (concluding that child witnesses are generally considered less credible, except in cases of sexual assault or when the child witness is "confident" in her testimony, in which case the child witness is perceived as more credible than adults); Raeder, *supra* note 226, at 375 (citing Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio's Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants—Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43 (1994)).

²³² See *supra* subsection II.B.1.a (explaining the central importance of the child victim's testimony).

²³³ Courtney Fisher, *What Matters: An Analysis of Victim Satisfaction in a Procedural Justice Framework* 1 (2014) (unpublished Ph.D. dissertation, University of Maryland, College Park), https://drum.lib.umd.edu/bitstream/handle/1903/16403/Fisher_umd_0117E_15875.pdf?sequence=1&isAllowed=y [<https://perma.cc/B23G-WQDP>] ("[W]ithout the victim believing in the system—or at least believing that the system is legitimate—the victim will not be motivated to begin or to continue with the process that is needed for the American criminal justice process to work.").

²³⁴ See *Tinker*, *supra* note 212, at 60 n.15 ("The defense attorney will not interview the child, in most cases, until cross-examination at trial, since the allegedly abused child is generally removed from the custody of the abusive adult and protected by a court order of protection."); see also *Obtaining An Order of Protection*, N.Y. STATE UNIFIED CT. SYS., <https://www.nycourts.gov/faq/orderofprotection.shtml> [<https://perma.cc/V7WR-TPD7>] (last updated Jan. 4, 2019) ("In a criminal case, the district attorney requests an order of protection for the victim or complaining witness.").

demise.²³⁵ Although uncooperative caregivers in child abuses cases are rare, they continue to perplex prosecutors and should be of considerable concern to a society that values child welfare.²³⁶ As a foundational matter, it is important to recognize, as so many critics of CPS overenforcement do, parents' broad rights in this area. As Justice Sandra Day O'Connor explained: "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme] Court."²³⁷ Indeed, a long line of Supreme Court precedent has repeatedly affirmed parents' Fourteenth Amendment rights in the "care, custody, and control" of their children.²³⁸ In New York, parents retain rights over their children when their children are under investigation in child delinquency proceedings. As the Court of Appeals has explained: "[T]he parent of the child has the right to attend the child's interrogation by the police officer, and should not be discouraged, directly or indirectly, from doing so."²³⁹ As a general rule, then, parents have important and enforceable rights over their children's liberty, including when their children become involved in the criminal justice system. Relatedly, the uncooperative parent is likely to be successful in influencing the child victim, not only because of the amount of time the two spend together outside of any official monitoring, but also because the child is "afraid of hurting or displeasing the parent."²⁴⁰

Why would a nonoffending parent refuse to cooperate? When the defendant is the nonoffending parent's intimate partner, the answer appears intuitive to some prosecutors: the nonoffending parent is choosing to protect that partner at the expense of the child.²⁴¹ These situations are extremely

²³⁵ See *supra* note 233 and accompanying text (discussing the need for cooperation from the child that is provided through the child's caregiver).

²³⁶ See STEPHANIE D. BLOCK & LINDA M. WILLIAMS, *THE PROSECUTION OF CHILD SEXUAL ABUSE: A PARTNERSHIP TO IMPROVE OUTCOMES* 22 (2019) (concluding that obtaining the support of nonoffending parents in criminal prosecutions remains a challenge for the field); Cross & Whitcomb, *supra* note 215, at 23 (identifying "children's caregivers not supporting prosecuting" as one reason why prosecutors decline to pursue child maltreatment cases nationally).

²³⁷ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

²³⁸ See *id.* at 65-66 (listing prior cases that affirm parents' rights in these areas).

²³⁹ See *In re Jimmy D.*, 938 N.E.2d 970, 973 (N.Y. 2010) (referencing "statutory and common-law principles" concerning parents' rights as the basis for the decision); accord N.Y. FAM. CT. ACT § 305.2(1)-(3) (McKinney 2020) (requiring the police to notify the child's parent or PLR of the child's arrest if the child is younger than sixteen years old).

²⁴⁰ Cf. *Tinker*, *supra* note 212, at 62. *Tinker* is writing in the context of a situation in which the defendant is an abusive parent, but the same set of loyalties also exist between the child and the uncooperative parent who is not a defendant.

²⁴¹ See BLOCK & WILLIAMS, *supra* note 236, at 21-22 (explaining that some cases do not move forward because the "[parent] seemed to defend a perpetrating partner, boyfriend, or girlfriend instead of protecting their child"); LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH* 180 (2017) ("Frequently, prosecutors portray mothers

difficult for the prosecutor to navigate, and can easily trigger CPS involvement against the nonoffending parent.²⁴² Action by CPS may be justified and necessary; by refusing to cooperate with law enforcement, the nonoffending parent risks allowing the abuse to repeat itself.²⁴³ This explanation, though prevalent in popular culture,²⁴⁴ is too simplistic. In general, family cases are difficult to prosecute: relationships between parties in a criminal case are the primary driver of so-called “case attrition” across different felony crime categories.²⁴⁵ Specifically as it relates to child abuse, the argument is deeply gendered because these cases disproportionately involve a mother’s boyfriend as the defendant.²⁴⁶ As Professor Linda C. Fentiman demonstrates, the idea of a mother shielding her child’s batterer may oversimplify the picture by disregarding the fact that the mother has often been subjected to the defendant’s violence as well.²⁴⁷ Indeed, we know from the domestic violence

who have not prevented harm to their children as having deliberately put their relationship with a lover . . . above their maternal obligations.”).

242 BLOCK & WILLIAMS, *supra* note 236, at 21-22.

243 Cf. FENTIMAN, *supra* note 241, at 180 (2017) (arguing that there are some instances in which “women who fail to protect their children from the violent acts of their partners” should be prosecuted after a fact-intensive examination of the reasons for the mother’s behavior).

244 See, e.g., Associated Press, *Children at Higher Risk in Nontraditional Homes*, NBC NEWS (Nov. 18, 2007 12:16 PM), <https://www.nbcnews.com/health/health-news/children-higher-risk-nontraditional-homes-flna1C9464008> [<https://perma.cc/KM7V-XEKK>] (“[M]any scholars and social workers who monitor America’s families see the abusive-boyfriend syndrome as part of a broader, deeply worrisome trend.”).

245 MILLER & WRIGHT, *supra* note 147, at 147 (quotation marks omitted). Miller and Wright rely on a significant study from the Vera Institute for Justice, which reported in 1981 that

criminal conduct is often the explosive spillover from ruptured personal relations among neighbors, friends and former spouses. Cases in which the victim and defendant were known to each other constituted 83% of rape arrests, 69% of assault arrests, 36% of robbery arrests, and 39% of burglary arrests. The reluctance of the complainants in these cases to pursue prosecution (often because they were reconciled with the defendants or in some cases because they feared the defendants) accounted for a larger proportion of the high rate of dismissal than any other factor. . . . [T]here can be no doubt that the relatively close defendant-victim relationship is responsible for much of the case deterioration in court.

VERA INST. OF JUST., *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS* 135 (rev. ed. 1981).

246 See FENTIMAN, *supra* note 241, at 184 (“Single women living with their children experience violence from their partners at a rate more than ten times that of married women with children.”) (footnote omitted); Leslie Margolin, *Child Abuse By Mothers’ Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541, 545, 549 (1992) (concluding that child abuse is more likely in single-parent homes, showing that most of that abuse is carried out by the mother’s boyfriend, and stating that potential causes for this elevated risk of abuse include generic factors such as elevated rates of abuse among nonparent caregivers and patterns of male abuse as well as specific factors like the lack of a genetic connection to the abused child).

247 See FENTIMAN, *supra* note 241, at 180 (“Family violence encompasses both child abuse and intimate partner violence . . . the two are frequently connected because abusive men use violence—and the threat of future violence—against women and their children to control the women.”).

context that the victim (or here, the uncooperative mother) often fears retaliation or a loss of economic support.²⁴⁸ Similarly, if domestic violence has led the mother to court in the past, she may be reluctant to return to a system that is too often unsupportive of victims.²⁴⁹ These considerations may make her decision not to cooperate seem much more pragmatic.

But above all else, it may be *uncertainty* that acts as the real barrier to justice here. Looking beyond the explanations just explored, confusion about the nature of parallel enforcement may also explain non-cooperation. When parents are involved with the child welfare or criminal justice system, their greatest concern is frequently child custody.²⁵⁰ For example, Professor Tina Lee, who conducted ethnographic field research in New York City's family courts, documented that women who had experienced domestic violence often feared reporting the abuse out of concern that they would "catch[] a case" with CPS and risk child removal.²⁵¹ In the minority communities that are policed by both CPS and law enforcement, there is significant distrust with respect to both systems,²⁵² and noncooperating caregivers may have previously had negative experiences with CPS or in criminal court. As demonstrated here, concern that CPS and law enforcement work together to enhance penalties against parents is not all misplaced. Indeed, criminologists who study victim behavior identify "challenges related to criminal justice institutions and personnel" as including "fear of secondary victimization, lack of awareness

²⁴⁸ See *id.* at 193 (identifying factors that prevent women from leaving their abusers). See generally Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution*, 63 FORDHAM L. REV. 853, 875 (1994) ("Prosecutors and advocates often fear that the continued prosecution of some domestic violence cases will expose battered women to retaliation from their batterers"). In situations of domestic violence coupled with child abuse, women face a "complex calculus" in deciding whether to leave the relationship, including the risk that leaving risks increasing violence toward her and her children. FENTIMAN, *supra* note 241, at 194.

²⁴⁹ See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Role of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 5 (1999) ("Incidents of domestic violence typically trigger multiple civil and criminal cases, each with distinct and complicated intake processes . . . This fragmented process hopelessly confuses most victims, and few manage to file for all the forms of complementary relief they need.").

²⁵⁰ See *supra* notes 148–49 and accompanying text.

²⁵¹ See Tina Lee, *Child Welfare Practice in Domestic Violence Cases in New York City: Problems for Poor Women of Color*, WOMEN, GENDER, & FAMS. OF COLOR, Spring 2015, at 58, 71–73; see also KARIN V. RHODES, CATHERINE CERULLI, CATHERINE L. KOTHARI, MELISSA E. DICHTER & STEVE MARCUS, VICTIM PARTICIPATION IN INTIMATE PARTNER VIOLENCE PROSECUTION: IMPLICATIONS FOR SAFETY 104 (2011) (stating that a victim may decline to report domestic violence because of fear of CPS involvement).

²⁵² See FENTIMAN, *supra* note 241, at 195–96 (detailing why women of color are particularly hesitant to report domestic abuse); see also Clifford & Silver-Greenberg, *supra* note 23 (describing the perception of "the criminalization of . . . parenting choices" among poor Black and Hispanic women in New York City); Roberts, *supra* note 117, at 1491 (explaining that Black mothers bear the brunt of law enforcement and CPS supervision of their parenting).

about available resources, or other structural impediments.”²⁵³ The evidence evaluated here suggests that a lack of certainty among nonoffending parents about parallel enforcement—which might not even be perceived as parallel by those it targets—may represent such a structural barrier to justice.

c. *Pursuing Justice for Children*

Even if the nonoffending caregiver is reluctant to cooperate with law enforcement, the caregiver does not have a legal basis to veto the prosecution of a crime against the child. First, cases of child abuse are distinct from, for instance, certain New York “family offenses,” in which the criminal court and family court exercise concurrent jurisdiction over the matter and in which the complainant may elect to proceed in either or both forums.²⁵⁴ In technical terms, this is because EWC is not a family offense and moreover, abuse against a child cannot be classified as a family offense if the alleged perpetrator does not fall within one of the legally recognized categories sufficient to constitute “family.”²⁵⁵

In addition, criminal prosecution vindicates an interest in the pursuit of justice that is independent from the parent’s constitutionally recognized right to control one’s child.²⁵⁶ Here, the extensive scholarship in the prosecution of domestic violence cases—an area in which victim noncooperation is a major problem—is instructive.²⁵⁷ Like victims of domestic violence, child abuse victims “encounter[] increased barriers to participation,”²⁵⁸ particularly when the nonoffending parent is the party actually or effectively making the decision on behalf of the child.

²⁵³ Leana A. Bouffard, Matt R. Nobles, Amanda Goodson, Kadee Brinser, Maria Koeppel, Miner P. Marchbanks & Nandita Chaundhuri, *Service Providers’ Knowledge and Perceptions of the Legal Service Needs of Crime Victims*, 42 AM. J. CRIM. JUST. 589, 589–90 (2017) (internal citations omitted).

²⁵⁴ Crimes that can constitute “family offenses” include Harassment in the First or Second Degree, Forcible Touching, and Assault in the Second or Third Degree. See N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney 2020); see also *id.* § 530.11(2)(h) (providing the complainant with a choice as to how to proceed).

²⁵⁵ See *id.* § 530.11(1) (defining family members as those who are “related by consanguinity or affinity,” married to each other or were previously married, parents to the same child, or in an intimate relationship, a designation which is at the discretion of the court); see also *People v. Leonel A.*, 610 N.Y.S.2d 451, 454 (N.Y.C. Crim. Ct., New York Cnty. 1994) (explaining that the dismissal of a criminal EWC case in favor of adjudication as an abuse and neglect matter in family court was not permitted given the serious nature of the physical abuse allegations which “if proven, [would] require additional sanctions unavailable to the Family Court”).

²⁵⁶ Cf. VERA INST. OF JUST., *supra* note 245, at 135 (explaining that while the collapse of cases because of relationships between the parties “may be rational from the perspective of the decision makers,” “it may not be rational or desirable in all cases” for the victim).

²⁵⁷ See *People v. McMullan*, 95 N.Y.S.3d 84, 85 (App. Div. 2019) (recognizing that admitting “limited” information about a pattern of domestic violence to be helpful in explaining why a victim did not call the police and could help “place the events in question in a believable context”). See generally Corsilles, *supra* note 248, at 870–73 (discussing reasons for victim noncooperation).

²⁵⁸ Corsilles, *supra* note 248, at 870.

At the same time, just like the mandatory prosecution of domestic violence, the prosecution of serious child abuse, even in the face of parental opposition, has the potential to “educate the public, change the conventional assumption that battering is a private matter, and ultimately bring about justice.”²⁵⁹ This concern about vindicating the rights of the child victim is especially relevant in this context: while prosecuting domestic violence cases over the objection of the victim may raise concerns about the victim’s autonomy,²⁶⁰ the child does not even have the opportunity to express such an opinion when the parent prevents the child from ever speaking to law enforcement. The child may be trapped.

At least in cases involving child abuse by a stranger, child victims who do not see their cases prosecuted “may feel that no one believed them, and they may fear being victimized again.”²⁶¹ Law enforcement has made significant strides when it comes to taking domestic violence seriously, and now must do so with crimes against children by aggressively pursuing child abuse, even over the nonoffending parent’s lack of cooperation or active interference. Although prosecutors must remain alert to circumstances in which prosecution may subject the child to more harm,²⁶² they should not cease prosecuting cases simply because a caregiver will not cooperate. As with the prosecution of domestic violence, pursuing the case despite the noncooperative parent’s lack of participation may ultimately empower the victim (and her parent) and even encourage later cooperation.²⁶³ The prosecutor must “tak[e] control of the criminal process” to signal that further abuse of the victim or nonoffending parent will not allow the defendant to skirt prosecution.²⁶⁴ Similarly, continued prosecution indicates to the

²⁵⁹ Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1908 (1996).

²⁶⁰ See *id.* at 1855 (discussing “tensions that underlie the question whether women ought to have a right to choose not to prosecute their batterers”).

²⁶¹ WHITCOMB, *supra* note 162, at 10.

²⁶² See Jennice Vilhauer, *Understanding the Victim: A Guide to Aid in the Prosecution of Domestic Violence*, 27 FORDHAM URB. L.J. 953, 961 (2000) (footnote omitted) (“Because of the fact that, unlike other crime victims, domestic abuse victims often remain in imminent danger of serious physical harm from the perpetrator, victim safety must be the foremost concern.”).

²⁶³ *Id.*; Elizabeth Rush, Jodi A. Quas & Bradley D. McAuliff, *Child Witnesses’ Experiences of Distress in Criminal Court: Sources, Consequences, and Solutions*, in STRESS, TRAUMA, & WELLBEING IN THE LEGAL SYSTEM 89, 91-95 (Monica K. Miller & Brian H. Borenstein eds., 2012) (surveying the data on children’s testimony and concluding that when provided with the necessary support, the experience of testifying “may allow[] them to feel that their voice has been heard” despite momentary discomfort at trial); cf. MILLER & WRIGHT, *supra* note 147, at 140 (explaining that a mandatory prosecution policy in domestic violence cases “takes the victim ‘off the hook’ and insulates her from pressure to drop the case coming from her partner, family, and friends”).

²⁶⁴ Vilhauer, *supra* note 262, at 961 (“[T]he prosecutor sends a clear message that the batterer cannot use control over the victim to avoid criminal sanctions.”).

uncooperative parent that there are greater societal interests at stake over which the parent may not exercise a unilateral veto.²⁶⁵

2. Making Enforcement Parallel

After committing to prosecuting the case, prosecutors must often secure the nonoffending parent's cooperation to obtain the child victim's testimony.²⁶⁶ To do this, the prosecutor can rely on several powerful tools such as out-of-home surprise interviews,²⁶⁷ subpoenas,²⁶⁸ or CPS action.²⁶⁹ But while these methods might more effectively force cooperation, they present some of the same risks associated with the criminalization of CPS: they could separate the child from an otherwise fit parent, which risks permanently alienating the uncooperative parent, retraumatizing the victim and uncooperative parent, and effectively punishing the victim for having made a disclosure of abuse.²⁷⁰ Therefore, less coercive methods are preferable under a child-centric framework. For example, informing the nonoffending parent about the true costs of child abuse may help alter the course of that parent's support for the child victim.²⁷¹ Likewise, law enforcement can "play an important role in responding to a victim's concerns and needs for services, specifically by

²⁶⁵ Cf. MILLER & WRIGHT, *supra* note 147, at 140 (explaining the mandatory prosecution laws in the domestic violence context "emphasize that society at large has an interest" in preventing it).

²⁶⁶ See *supra* note 233 and accompanying text (explaining the nonoffending parent's key role).

²⁶⁷ See PENCE & WILSON, *supra* note 20, at 19 ("Many investigators have had success interviewing children at school . . .").

²⁶⁸ See MARY A. FINN, EFFECTS OF VICTIMS' EXPERIENCES WITH PROSECUTORS ON VICTIM EMPOWERMENT AND RE-OCCURRENCE OF INTIMATE PARTNER VIOLENCE 12 (2003) (describing subpoenas as the "most coercive strategy that prosecutors may use" because ignoring a subpoena can result in the issuance of an arrest warrant).

²⁶⁹ See BLOCK & WILLIAMS, *supra* note 236, at 20-21 (noting the increased likelihood of prosecution when CPS has acted).

²⁷⁰ PENCE & WILSON, *supra* note 20, at 21 (explaining the nonoffending parents often fear law enforcement after an investigation has been opened); cf. WHITCOMB, *supra* note 162, at 11 (stating that removal from the home and placement into foster care after making an allegation of abuse "may feel like punishment to the child"). See generally CTR. FOR IMPROVEMENT OF CHILD & FAM. SERVS., PORTLAND STATE UNIV., REDUCING THE TRAUMA ON INVESTIGATION, REMOVAL, & INITIAL OUT-OF-HOME PLACEMENT IN CHILD ABUSE CASES 10 ("The potential for children to be traumatized during the process of investigation, removal and out-of-home placement is high, as these processes often involve conflictual interactions between professionals and family members and can evoke fear, resistance, and hostility.").

²⁷¹ See BLOCK & WILLIAMS, *supra* note 236, at 22 (emphasizing the need for "psycho-educational approaches" in dealing with nonoffending parents that stress the need to believe the child); see also Julie A. Lipovsky, Cynthia Cupit Swenson, M. Elizabeth Ralston & Benjamin E. Saunders, *The Abuse Clarification Process in the Treatment of Intrafamilial Child Abuse*, 22 CHILD ABUSE & NEGLECT 729, 730 (1998) ("[F]or nonoffending family members, abuse-related causal beliefs [about those abusive events] may affect the expression of support of the child victim and the quality of the child's subsequent functioning.").

providing referrals to victim service agencies or other resources.”²⁷² But because uncertainty surrounding engagement with law enforcement and its relationship to CPS can cause noncompliance, law enforcement ought to now support the victim and nonoffending parent by clearly expressing and formalizing the distinct roles played by the two systems.

Specifically, nonoffending caregivers need assurance that cooperation with law enforcement in criminal matters involving their children will not result in a collateral family court proceeding against them and subject them to what many fear most: child removal. In concrete terms, such assurance might take the form of a formalized agreement between the district attorney, CPS, and nonoffending parent that no CPS or criminal action will be opened against the parent for the underlying events that gave rise to the criminal action against the defendant.

Such an agreement would be subject to several conditions. For one, both CPS and law enforcement would need to determine that the parent is truly nonoffending. Reaching this threshold determination would likely be the most difficult part of such a plan because any agreement would need to be entered into relatively early in the investigative process to avoid contaminating evidence and infringing on speedy trial rights. Nevertheless, the relevant agencies could draw upon existing, statutorily authorized tools such as the MDT/CAC in order to make this decision with all relevant stakeholders. In addition, the nonoffending parent would still be subject to civil or criminal liability for other, unrelated accusations of child abuse or neglect. Accordingly, the agreement would need to be specific as to the range of covered conduct. Finally, the nonoffending parent would need to actually assist in the investigation by granting the district attorney access to her child and complying with any existing court orders, including the no-contact order between the defendant and the child.²⁷³

This intervention is not radical but would nevertheless provide much needed clarity to parents in highly stressful situations and who struggle to make sense of the blurred lines between the family and criminal systems. A formal agreement restricting a case to one court system is familiar to parallel enforcers²⁷⁴ and should now be extended to family and criminal law. Likewise,

²⁷² Bouffard et al., *supra* note 253, at 589-90.

²⁷³ See *supra* note 234 and accompanying text.

²⁷⁴ See, e.g., U.S. Dep't of Just., Organization and Functions Manual § 27 (2012) (acknowledging that although a case comes into the system as a criminal matter, “it may be appropriate for the matter to include and/or be resolved through a civil, regulatory, or administrative remedy”); PETER FINN & MARY O'BRIEN HYLTON, USING CIVIL REMEDIES FOR CRIMINAL BEHAVIOR xi (1994) (“These jurisdictions have found that civil remedies can be easier to use than criminal sanctions . . . because they often do not require victims to testify, can provide immediate relief (for instance, through injunctions and restraining orders), and avoid the needs for a labor-intensive criminal or civil trial.”).

deferred prosecution, immunity, and cooperation agreements routinely seek to clarify the terms upon which a witness will participate in a criminal investigation.²⁷⁵ Additionally, this proposal is modest, insofar as it essentially provides formality to what should be the status quo: the nonoffending caregiver will not be punished for the abusive actions of another. But the agreement would not be inconsequential. On one hand, it brings the stakes of noncooperation out into the open for the parent, confirming that noncooperation risks civil and criminal sanctions. On the other hand, and more importantly, it provides a nonoffending parent with a more definite picture of what one can expect from the legal system, alleviating the uncertainty that often accompanies victimization.²⁷⁶

Beyond the reassurance for the child victim and the caregiver, this proposal would also yield systemic benefits for law enforcement. An additional, more finely calibrated tool for obtaining or shoring up caregiver support may allow prosecutors to overcome the institutional “inertia” that has thus far allowed uncooperative parents to obstruct prosecutions.²⁷⁷ Furthermore, even if the use of formal agreements fails to yield immediate results in terms of gaining caregiver cooperation, the proposal to shift many cases to family court would free up resources for assistant district attorneys to pursue more resource-intensive techniques, such as evidence-based prosecution,²⁷⁸ which do not require the child victim’s participation.

III. PARALLEL ENFORCEMENT REDUX

This Comment proposes two targeted interventions into a confused parallel enforcement dynamic that has collapsed into a single powerful enforcement regime. As a result of overenforcement, caregivers living in poverty too often find themselves subjected to dual Article 10 and EWC

²⁷⁵ These actions represent the exercise of prosecutorial discretion in practice. *See, e.g.*, AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(f) (2017) (“The prosecutor should consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition”); *id.* § 3-4.6(h) (discussing immunity agreements); U.S. Dep’t of Just., *supra* note 25, § 9-27.600-630 (providing guidelines for entering into non-prosecution agreements in exchange for cooperation).

²⁷⁶ *Cf.* Bouffard et al., *supra* note 253, at 589-90 (discussing the emotional challenges that nonoffending parents face).

²⁷⁷ *See* Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748, 762 (2018) (explaining that line prosecutors might not be as motivated to pursue reform as aggressively as their supervisors); Rachel Louise Snyder, Opinion, *We Prosecute Murder Without the Victim’s Help. Why Not Domestic Violence?*, N.Y. TIMES (May 4, 2019), <https://www.nytimes.com/2019/05/04/opinion/sunday/domestic-violence-recanting-crawford.html> [<https://perma.cc/94JZ-ZR85>] (“Authorities in many jurisdictions still believe that without victim cooperation, there’s no reason to prosecute.”).

²⁷⁸ Evidence-based prosecution is a practice in which a prosecutor attempts to prove the case with evidence other than the victim’s testimony at trial. *See generally* Snyder, *supra* note 277 (tracing the development of evidence-based prosecution, including how it is used post-*Crawford*).

proceedings on the basis of child neglect. Here, the logic of parallel enforcement justifies compounded sanctions, while in practice it blends investigative and adjudicative functions in an environment with weak procedural protections. At the same time, an uncooperative parent—who may justifiably fear interaction with an enforcement regime that threatens personal liberty and the parent-child relationship²⁷⁹—can deny the child victim of abuse the opportunity to be heard. By shifting the neglect-only cases back into their traditional domain of family court, and by more aggressively pursuing cases of serious child abuse, New York will build a necessary wall between the two systems. This better adheres to federal and state law and represents a more balanced enforcement model capable of replication in other jurisdictions.

A. *Compliance with State and Federal Law*

The proposed recalibration of enforcement priorities would better align New York with state and federal law. First, an approach oriented toward the provision of services through CPS would seek to prevent child neglect by tackling the root problem of poverty. This strategy is in step with the current federal approach as codified in the Family First Prevention Services Act.²⁸⁰ Even if that law does not (and could not) go far enough toward addressing “all the ways that public systems fail poor families,”²⁸¹ ceasing the criminal prosecution of most poverty-related neglect cases is a logical first step in “strengthen[ing] families before the need for removal arises,” the law’s foremost goal.²⁸²

By disentangling CPS and law enforcement in this set of cases, the state could more effectively devote resources away from enforcement and toward service delivery.²⁸³ Professor Douglas J. Besharov has described this dynamic of overenforcement in the child welfare context as a case of “[t]oo [l]ittle and [t]oo [m]uch,” in that “children in real danger of serious maltreatment get lost

²⁷⁹ See Besharov, *supra* note 93, at 559 (“[I]nvoluntary removal of the child or the offending adult from the home is always a possible consequence of intervention. . . . This is a paradigm of coercive state intervention into family life.”).

²⁸⁰ See *supra* notes 189–91 and accompanying text (explaining how a renewed focus on services is aligned with the Family First approach).

²⁸¹ KRAMER, *supra* note 52, at 3; see *id.* (describing “homelessness, addiction, unemployment, mental illness, domestic violence, and grinding, intergenerational poverty” as factors that lead families to court); Villalpando, *supra* note 191, at 285–86 (2019) (summarizing concerns with the law, particularly the twelve-month limitation on the provision of preventative services designed to solve complex issues like addiction).

²⁸² Villalpando, *supra* note 191, at 284–86.

²⁸³ CPS already faces significant resource limitations because of its legal requirement to investigate all reports, even if a majority of them turn out to be unfounded. See Besharov, *supra* note 91, at 563 (“Forced to allocate a substantial portion of their limited resources to these ‘unfounded’ reports, protective agencies often are unable to respond promptly and effectively when children are in serious danger.”).

in the press of the minor cases flooding the system.”²⁸⁴ Since Besharov provided that description in 1985, the problem of CPS overenforcement has continued to grow, particularly through the “criminalization” of child welfare, including the state’s increased willingness to employ criminal sanctions against parents.²⁸⁵ At the same time, CPS’ strengthened commitment to and capacity for delivering preventative services allows CPS to intervene in potential neglect cases earlier, preserving family unity by avoiding the avenues that can lead to child removal and foster care.²⁸⁶

Second, shifting neglect cases primarily into CPS’ scope of authority practically answers Vreeland’s criticism that criminalization runs counter to state and federal requirements that the state make “reasonable efforts” at keeping the family intact.²⁸⁷ Formally, the reasonable efforts analysis is limited to the family court context, but as Vreeland convincingly shows, a more robust analysis considers the obvious impact that a criminal neglect prosecution will have on the family.²⁸⁸ The proposal here goes even further than Vreeland’s by calling for a more pronounced separation between the two systems. It also broadens the conception of child welfare by actually calling for increased prosecution in more severe cases. This focus on serious cases of child abuse would bring prosecutorial practice in line with the purpose of New York’s criminal law, which promises “[t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim’s family, and the community.”²⁸⁹ Even more fundamentally, the systematic recalibration proposed here “differentiate[s] on reasonable grounds between serious and minor offenses” through the imposition of “proportionate penalties.”²⁹⁰

Finally, this pair of proposals would bring executive action in the child welfare space into line with the dictates of the Court of Appeals’ ruling in *Nicholson*. In that case, the court examined the Family Court Act’s legislative history and concluded that “a blanket presumption favoring removal was never intended.”²⁹¹ In operationalizing the relevant standards, the court held that the mere existence of a risk to the child was an insufficient basis upon

²⁸⁴ *Id.* at 562.

²⁸⁵ *See supra* subsection II.A.2.

²⁸⁶ *See supra* note 201 and accompanying text (explaining how New York CPS is particularly well equipped in the area of delivering preventative services).

²⁸⁷ *See supra* note 51 and accompanying text (describing this requirement in federal and state law); Vreeland, *supra* note 156, at 1072.

²⁸⁸ N.Y. FAM. CT. ACT § 1039-B (McKinney 2020); Vreeland, *supra* note 156, at 1072, 1094.

²⁸⁹ N.Y. PENAL LAW § 1.05(5) (McKinney 2020). Vreeland makes reference to this provision of the Penal Law, but it appears that the author referred to a historical version of the statute or another source entirely. *See* Vreeland, *supra* note 156, at 1072 n.171.

²⁹⁰ PENAL § 1.05(4).

²⁹¹ *Nicholson v. Scopetta*, 820 N.E.2d 840, 852 (N.Y. 2004).

which the state could seek removal.²⁹² Rather, the family court must determine “whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal.”²⁹³ Here, the court emphasized the availability of different remedies, including orders of protection and victim services, that could be used to reduce the risk to the child by “maintaining the integrity of the family unit and instead remov[ing] the abuser.”²⁹⁴ The proposal presented here aligns with *Nicholson’s* approach of balancing the dual legal imperatives of protecting the child’s safety and respecting the integrity of the family. In particular, the proposal seeks to increase the probability that the child will not be removed from the caregiver most equipped to care for the child. Critically, achieving this goal requires reform of both the family and criminal law domains. The state should exercise enforcement discretion in not pursuing otherwise fit caregivers whose poverty led them to court, but should aggressively seek to remove those who have actively harmed the child. Adjusting how the government intervenes into family life could finally help the safe home to become a reality for more of New York’s children.

B. Looking Beyond New York

The proposals outlined here can be used in other U.S. jurisdictions. In 2018, Jerry Milner, the Associate Commissioner of the Children’s Bureau, compared the current American approach to child welfare to the government buying ambulances, rather than airbags and seatbelts, to protect drivers; that is to say, there is an emphasis on reacting to the problems of child abuse and neglect rather than intervening early and preventing incidents from occurring in the first place.²⁹⁵ To bring about this paradigm shift, Milner emphasized the “tremendous role” of the legal community in “jointly own[ing] the outcomes that we are trying to achieve,” specifically by ensuring the “wellbeing of families.”²⁹⁶ Indeed, New York’s enforcement imbalance in this realm—with its negative consequences for children and families—reflects a broader problem in the United States. Nevertheless, both the analytical frame

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Nat’l Ctr. for State Cts., *Imagine a New Child Welfare System*, VIMEO (June 25, 2018), <https://vimeo.com/276889408> [<https://perma.cc/SE7N-J7CZ>].

²⁹⁶ See *id.* (stressing the need for preventative services in order to prevent first-time incidents of child maltreatment); accord David Kelly, *Beyond the Table: The Need to Work with Courts and the Legal Community to Improve Child Welfare Outcomes*, CHILD’S BUREAU EXPRESS (Dec. 2018/Jan. 2019), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=202§ionid=2&articleid=5249> [<https://perma.cc/4UUG-ZZEN>] (“It is in no one’s interest to remove children unnecessarily or keep children and youth in care longer than absolutely necessary.”).

and simple legal solutions offered here represent meaningful first steps in moving toward a more family-centric, wellbeing-oriented model.

Although child welfare originated as and remains rooted in state law, the trend toward the centralization of child welfare policy has made it increasingly possible to identify systemic issues.²⁹⁷ In this vein, child abuse and neglect are unmistakably national problems: in FFY 2018, there were 678,000 unique child victims.²⁹⁸ 1,738 of them died because of maltreatment.²⁹⁹ In responding to this large number of cases, other states have ended up in the same enforcement paradox as New York, overenforcing neglect provisions and underenforcing abuse crimes. Between 1990 and 2017, rates of substantiated physical abuse declined by 40%, while rates of substantiated neglect fell by only 8%.³⁰⁰ During the same time period, neglect cases as a proportion of total cases rose from 49% to 75%.³⁰¹

In this context, overenforcement remains a consistent issue. While the federal Child Abuse Prevention and Treatment Act and subsequent legislation provide a general, baseline definition of child abuse and neglect,³⁰² states diverge widely in defining the term.³⁰³ Some exclude elements of neglect that would appear to pose the greatest harm to children, such as failing to provide medical care or proper nutrition, while others include elements, such as supplying inadequate clothing, in which preventative services or public assistance are likely to provide relatively straightforward solutions.³⁰⁴ Similarly, the “thresholds for intervention” vary

²⁹⁷ See Sankaran, *supra* note 133, at 2-3 (explaining that the federal government “has sought to create uniformity in how states administer child welfare systems” by tying federal funding to minimum standards); KASIA O’NEILL MURRAY & SARAH GESIRIECH, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 1 (2004) (“[T]he federal government’s role in the modern child welfare system has increased as federal funding augmentations are accompanied by new rules and requirements emphasizing greater accountability on the part of states in achieving positive child outcomes.”); JILL GOLDMAN, MARSHA K. SALUS, DEBORAH WOLCOTT & KRISTIE Y. KENNEDY, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 51 (2003) (explaining that the Social Security Act created a “uniform framework for administration” over existing state child welfare programs).

²⁹⁸ CHILD MALTREATMENT 2018, *supra* note 94, at 19 tbl.3-C.

²⁹⁹ *Id.* at 46.

³⁰⁰ *Child Maltreatment*, CHILD TRENDS (May 7, 2019), <https://www.childtrends.org/indicators/child-maltreatment> [<https://perma.cc/4V4E-DGQW>].

³⁰¹ *Id.*

³⁰² See CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, tit. I, § 142(a) (amending Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 3 (1974)) (codified at 42 U.S.C. § 5101 note) (“[T]he term ‘child abuse and neglect’ means, at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . .”).

³⁰³ See Rebecca Rebbe, *What Is Neglect? State Legal Definitions in the United States*, 23 CHILD MALTREATMENT 303, 305 (2018) (noting that states’ definitions of neglect reflect constituents’ specific concerns in light of fiscal constraints); see also CHILD’S BUREAU, U.S. DEPT OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 2-4 (2019) (surveying state laws and noting the variation with respect to the types of behaviors that constitute child neglect).

³⁰⁴ See Rebbe, *supra* note 303, at 308 tbl.2.

widely: whereas thirty-four states may take civil action in the face of threatened harm alone, twenty-one apply a more holistic, “child-focused definition” when deciding whether to intervene.³⁰⁵ Accordingly, both social workers and legal actors may exercise various levels of discretion when making enforcement decisions.³⁰⁶ This discretion is heightened when these officials must make judgment calls regarding statutory and regulatory language such as “adequate supervision,” which demands the consideration of multiple context-specific factors.³⁰⁷ As in New York, parents around the country enter into agreements with child protection agencies during investigations,³⁰⁸ replicating the interventions that would otherwise be possible only with some degree of judicial oversight.

Dual enforcement regimes are also common, as all states employ parallel enforcement structures and provide for the criminal enforcement of child abuse

³⁰⁵ *Id.* at 308-10. A comparison across various states reflects different breadths of statutory definitions. *See id.* at 309 fig.1 (depicting this diversity). Compare N.M. STAT. ANN. § 32A-4-2(G)(2) (2020) (defining a neglected child as one “who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child’s well-being because of the faults or habits of the child’s [PLR] or the failure or refusal of the [PLR] when able to do so, to provide them”), and MD. CODE ANN., FAM. LAW § 5-701(s) (LexisNexis 2020) (“‘Neglect’ means the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or [PLR] under circumstances that indicate: (1) that the child’s health or welfare is harmed or placed at substantial risk of harm; or (2) mental injury to the child or a substantial risk of mental injury.”), with KAN. STAT. ANN. § 38-2202(t) (2019) (defining neglect as “acts or omissions by a parent, guardian or [PLR] resulting in harm to a child, or presenting a likelihood of harm, and the acts or omissions are not due solely to the lack of financial means of the child’s parents or other custodian”), and VT. STAT. ANN. tit. 33, § 4912(1) (2020) (providing one combined definition of “abused or neglected” child as including “a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other [PLR]”), with OHIO REV. CODE ANN. § 2151.03(A)(6) (LexisNexis 2020) (defining a neglected child as one “[w]ho, because of the omission of the child’s [PLR] suffers physical or mental injury that harms or threatens to harm the child’s health or welfare”), and N.D. CENT. CODE § 50-25.1-02(14)(a) (2020) (defining a neglected child as one “without proper care or control, subsistence, education as required by law, or other care or control necessary for the child’s physical, mental, or emotional health, or morals, and is not due primarily to the lack of financial means of [the PLR]”). There is limited data available as to the effect of variance in statutory definitions and the inclusion of new elements in neglect statutes on child safety outcomes. *See* INST. OF MED. & NAT’L RSCH. COUNCIL, *supra* note 3, at 355-56.

³⁰⁶ Rebbe, *supra* note 301, at 310-11.

³⁰⁷ CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., LEAVING YOUR CHILD HOME ALONE 2 (2018) (“States do not provide any detail on what is considered ‘adequate supervision’ . . . [F]actors . . . such as the child’s age, mental ability, and physical condition; the length of the parent’s absence; and the home environment [are considered in evaluating supervision].”); *see also* N.J. Div. of Child Prot. & Permanency v. C.V., No. A-2940-17T4, 2019 WL 1300518, at *2 (N.J. Super. Ct. App. Div. Mar. 20, 2019) (collecting cases and stating that appellate courts have looked to “the child’s age and the duration of the lack of adult supervision,” as well as, critically, the parent’s culpability); *Ghosh v. Ill. Dep’t of Child. & Fam. Servs.*, No. 13-1099, 2014 WL 2730725, at *9 (Ill. App. Ct. June 13, 2014) (noting that regulations instruct the Department of Children and Family Services to evaluate fifteen different factors in determining whether a parent exercised inadequate supervision).

³⁰⁸ *See* INST. OF MED. & NAT’L RSCH. COUNCIL, *supra* note 3, at 59 (“In many child protection cases . . . no formal legal process is even initiated; the family agrees to a voluntary service plan that is overseen by the state.”); *see also* Brown, *supra* note 44 (criticizing this practice).

and neglect.³⁰⁹ The trend in New York toward criminalization as a product of cooperation between CPS and law enforcement reflects a broader, national development.³¹⁰ There are different models of CPS–law enforcement cooperation across the country.³¹¹ While some basic practices such as the sharing of child abuse and neglect reports are universal, some jurisdictions engage in more extensive strategies of interagency cooperation.³¹² Florida’s system, for example, goes even further than New York’s in explicitly mixing the functions of CPS and law enforcement, with Florida police officers conducting over a quarter of child abuse and neglect investigations.³¹³ Predictably, the problems associated with CPS overenforcement plague many communities across the United States, creating fault lines between the communities at the receiving end of child welfare enforcement and the state.³¹⁴ By more consciously moving neglect cases into the exclusive domain of CPS, CPS and law enforcement could more clearly define relationships to the communities they work in by reducing unnecessary child removals and criminal convictions.

309 CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., WHAT IS CHILD WELFARE? A GUIDE FOR LAW ENFORCEMENT 1 (2018) (“Each State has requirements for when and how law enforcement and child welfare should interact.”); GOLDMAN ET AL., *supra* note 297, at 55 (noting the participation of “civil and criminal” courts at the state level); *id.* at 56 (outlining behaviors that rise to the level of criminality in most jurisdictions, including “[c]riminal neglect and abandonment”).

310 Professor Roberts summarized the state of affairs in 2002:

Many cases fall within the scope of general criminal statutes, such as those punishing assaults, homicides, sexual assaults, and incest. Many states have also passed special criminal child abuse and neglect statutes. In most states, child welfare agencies notify police about the most serious cases of abuse. But police are increasingly arresting parents even for minor instances of neglect that traditionally had been handled by child protective services.

ROBERTS, *supra* note 81, at 77; *see also* David Finkelhor & Richard Ormrod, *Child Abuse Reported to the Police*, JUV. JUST. BULL., May 2001, at 2, 7 (noting an increase in police involvement in child abuse and neglect cases nationwide).

311 *See* CASEY FAM. PROGRAMS, SUPPORTIVE COMMUNITIES 2-3 (2018), https://caseyfamilypro.wpengine.netdna-ssl.com/media/SComm_Models_Law_Enforcement_fnl.pdf [<https://perma.cc/TP7P-ZC9P>] (outlining three different categories of collaboration models as “[m]inimal law enforcement involvement or coordination[,]” “[j]oint collaborative child abuse and neglect investigations[,]” and “[s]ole law enforcement investigation responsibility”).

312 *See id.* at 4-6 (describing the interagency strategies used in seven states).

313 *See id.* at 6; Finkelhor & Ormrod, *supra* note 310, at 7 (explaining that the transfer of authority in Florida represented a break from the traditional division of functions between the agencies).

314 *See* Diane Redleaf, *After the Hotline Call*, ATLANTIC (Jan. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/problem-child-protective-services/580771> [<https://perma.cc/EX7N-TDSD>] (“Threats of family separation, coupled with restrictions on families’ living arrangements during CPS investigations, are commonplace in a number of states, including Illinois.”); *cf.* ROBERTS, *supra* note 81, at 94 (explaining how overenforcement targets Black communities with high levels of childhood poverty); *see also* Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 125, 133 (2008) (evaluating interviews with African American women in Chicago and concluding that “[k]ey social effects of the concentration of DCFS [CPS] supervision included: interference with parental authority, damage to children’s ability to form social relationships, and distrust among neighbors”).

At the same time, underenforcement is also a national problem. Physical abuse is almost always a crime, commonly a misdemeanor.³¹⁵ Prosecutors around the country find child abuse difficult to prosecute, especially because of the unavailability of evidence and the developmental inability of some child victims to testify.³¹⁶ While states have expanded the formal rights of crime victims in general,³¹⁷ state constitutional and statutory guarantees fail to account for the unique needs of child victims,³¹⁸ whose rights remain “weak.”³¹⁹ Furthermore, U.S. Supreme Court decisions like *Crawford*³²⁰ and those

³¹⁵ See INST. OF MED. & NAT’L RSCH. COUNCIL, *supra* note 3, at 35 (noting an exception in some physical abuse statutes for certain types of corporal punishments). Compare CONN. GEN. STAT. § 53-21(a)(1) (2020) (defining the crime as “willfully or unlawfully caus[ing] or permit[ting] any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child”), with 18 PA. CONSOL. STAT. § 4304(a)(1) (2017) (“A [PLR] of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.”).

³¹⁶ See generally Cross & Whitcomb, *supra* note 215, at 22-23 (ranking the prevalence of reported challenges based on a national survey of prosecutors).

³¹⁷ See RICHARD G. SINGER & KENNETH WILLIAMS, CRIMINAL PROCEDURE II: FROM BAIL TO JAIL 438 (4th ed. 2018) (“By the late twentieth century, individual victims of crimes had increasingly won the right to participate in the criminal process. No longer limited to being ‘witnesses for the prosecution,’ victims are now acknowledged by many state constitutions and statutes . . .”) (footnote omitted). For a substantive and procedural critique of a recently passed “victim’s rights” constitutional amendment in Pennsylvania, see Elizabeth Randol, *Why Pennsylvanians Should Vote “No” on Marsy’s Law*, AM. CIV. LIBERTIES UNION OF PA. (Oct. 24, 2019, 2:45 PM), <https://www.aclupa.org/en/news/why-pennsylvanians-should-vote-no-marsys-law> [<https://perma.cc/W3HZ-JKVE>].

³¹⁸ See, e.g., CAL. CONST. art. I, § 28 (providing no special protections to child victims its Victim’s Bill of Rights); OKLA. STAT. tit. 21, § 142A-2 (2020) (same in the statutory context). Specific references to young victims serve to allow parents or PLRs to assert the rights guaranteed to adult victims. E.g., N.C. CONST. art. I § 37(1b) (“[I]f the victim is a minor . . . a family member, guardian, or legal custodian may assert the rights provided in this section.”); S.D. CONST. art. VI, § 29, ¶ 19 cl. 4 (similar). These clauses, of course, are of little use if a parent or PLR is unwilling to assert these expanded rights on behalf of his child. Exceptionally, Washington State does have a specific and comprehensive statute addressing the needs of child victims and witnesses; however, “the enumeration of [these] rights shall not be construed to create substantive rights and duties, and the application of an enumerated right in an individual case is subject to the discretion of the law enforcement agency, prosecutor, or judge.” WASH. REV. CODE § 7.69A.030 (flush language) (2020).

³¹⁹ See Chiamulera, *supra* note 230 (quoting a lawyer who advocates for the “very proactive” representation of child victims).

³²⁰ E.g., *State v. Arnold*, 933 N.E.2d 775, 784 (Ohio 2010) (concluding that *Crawford* applies when the statements obtained by a CAC social worker “related primarily to the state’s forensic investigation[,]” rather than “for medical diagnosis or treatment” of the victim); *State v. Pitt*, 147 P.3d 940, 944 (Or. Ct. App. 2006) (holding that statements made by child victims to a CAC director are “undebatably [sic] ‘testimonial’” for *Crawford* purposes); see *State v. Blue*, 717 N.W. 558, 563-64 (N.D. 2006) (collecting cases from various jurisdictions and describing the applicability of *Crawford* as the majority position); see also Cross & Whitcomb, *supra* note 215, at 25-26 (explaining reported views on *Crawford*’s impact on the prevalence of charging cases, having child victims testify, and obtaining convictions). But see *id.* at 21 (expressing a more ambivalent view about *Crawford*’s overall impact).

enshrining the rights of parents³²¹ are federal law and pose a difficulty for prosecutors seeking to pursue cases with child witnesses who are unavailable to testify, either because of their developmental state or because of the actions of their caregivers. Given the close relationship between CPS and law enforcement across the country, it is plausible that fear of working with law enforcement as a result of an unclear division of authority between the two agencies is a barrier to successful prosecution outside of New York, too. As such, formally expressing the difference between the systems could be a constructive first step in increasing the willingness of uncooperative caregivers to assist in the prosecution of more serious cases of child abuse. In sum, nationalizing the model proposed here would allow CPS and law enforcement agencies across the country to specialize in what they do best, an important step toward rebuilding or reaffirming trust in the institutions that are vitally important for the protection of our society's vulnerable—children and families.

CONCLUSION

Applying the framework of parallel enforcement to the relationship between local CPS and law enforcement in New York illuminates the complex relationship between the two agencies. Parallel enforcement proves to be a malleable legal tool, simultaneously justifying the existence of systems capable of investigating and sanctioning the same conduct, while also frequently bringing the two together in order to enhance the efficacy of both. As this Comment has shown, though, efficacy is not necessarily an admirable goal, especially when resources are misallocated toward pursuing cases of child neglect, in which prevention services and prospective assistance are likely to be most effective in fulfilling the legal requirement to prioritize family unity.

At the same time, caregivers whose children have been victims of serious abuse currently exercise too much power in criminal investigations. This Comment challenges the idea that noncooperation is a byproduct of bad intentions or poor parenting, and instead suggests that fear bred by an understandable lack of clarity about the two institutions is a hurdle to developing a productive relationship with nonoffending caregivers. As preliminary steps toward resolving this enforcement paradox, I recommend shifting more cases of poverty-related neglect out of the criminal system and providing nonoffending caregivers with legal clarity in the cases of child abuse. Taken together, these recommendations could help to keep violent abusers away from children and enable families to use social services, care for their children, and remain unified.

321 See *supra* notes 237–38 and accompanying text (discussing the recognition of strong parental rights).